

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**IN THE MATTER OF PUBLIC SERVICE )  
COMPANY OF NEW MEXICO'S )  
APPLICATION FOR APPROVAL OF A )  
345 KV TRANSMISSION LINE )  
AND ASSOCIATED FACILITIES )  
PURSUANT TO THE PUBLIC UTILITY ACT )  
\_\_\_\_\_  
)**

**Case No. 18-00243-UT**

**RECOMMENDED DECISION**

**March 11, 2019**

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Carolyn R. Glick, Hearing Examiner for the New Mexico Public Regulation Commission (Commission), submits this Recommended Decision to the Commission pursuant to 1.2.2.37(B) NMAC. The Hearing Examiner recommends that the Commission adopt this Recommended Decision in its Final Order.

## **I. STATEMENT OF THE CASE**

On August 10, 2018, Public Service Company of New Mexico (PNM) filed an Application requesting that the Commission grant PNM the following relief:

- a. Issue a certificate of public convenience and necessity authorizing PNM to construct, operate and maintain a 345-kilovolt transmission line and associated facilities (the BB2 Project);
- b. Determine the ratemaking principles and treatment to apply to the BB2 Project;
- c. Approve the location of the BB2 Project; and
- d. Authorize a right-of-way width greater than 100 feet.

The following persons filed motions for leave to intervene:

- Bill King Ranch (BKR)
- The Coalition for Clean Affordable Energy (CCAE)
- The New Mexico Industrial Energy Consumers (NMIEC)

PNM filed an Affidavit of Publication attesting that the Notice of Application was published on August 25, 2018 in the *Albuquerque Journal* and the *Santa Fe New Mexican*.

The Commission appointed the Undersigned to preside over a January 16, 2019 hearing. During the January 16, 2019 hearing, the Commission appointed the Undersigned as Hearing Examiner to preside over the case and issue a recommended decision. During that hearing, the parties agreed to extend the six-month statutory deadline to May 10, 2019 for the Commission to issue a final order on PNM's request for a determination of the necessary right-of-way width

to construct and maintain the transmission line. Tr. 1-16-19 at 93-94.<sup>1</sup> The hearing continued and concluded on February 4, 2019.

The following witnesses testified:

For PNM:

- Jeff Mechenbier, Director of the Transmission/Distribution Planning and Contracts Department, PNM
- Douglas Campbell, Project Manager, PNM Environmental Services Department
- Eric Johnson, Senior Environmental Project Manager, Marron and Associates
- Kelli Alcantar, Manager, Cost of Service, PNMR Services Company

For BKR:

- Bill King, Owner and Operator, Bill King Ranch

For Staff:

- Jack Sidler, Electrical Engineer, Utility Division Staff

The following exhibits were admitted into evidence:

PNM Exhibits:

- 1 Direct Testimony of Jeff Mechenbier
- 2 October 17, 2018 Supplemental Testimony of Jeff Mechenbier
- 3 Rebuttal Testimony of Jeff Mechenbier
- 4 Direct Testimony of Douglas Campbell
- 5 Rebuttal Testimony of Douglas Campbell
- 6 Direct Testimony of Kelli Alcantar
- 7 Direct Testimony of Eric Johnson
- 9 Photograph

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<sup>1</sup> Extension of the statutory deadline was necessary to allow time for issuance of a recommended decision, the filing of exceptions and issuance of a final order following the relatively late appointment of a hearing examiner. The Commission's approval of extension of the statutory deadline is without precedent. Tr. 1-16-19 at 78.

BKR Exhibits:

- 1 Direct Testimony of Bill King
- 7 Photograph

Staff Exhibits:

- 1 Direct Testimony of Jack Sidler
- 2 January 9, 2019 Supplemental Testimony of Jack Sidler

Commission Exhibits:

- 1 Special Service Contract Between PNM and Facebook
- 2 PNM's Third Revised Rate No. 36B
- 3 PNM's First Revised Rider No. 47
- 4 PNM's Original Rider No. 49
- 5 Special Service Contract Between PNM and Greater Kudo

PNM, BKR and Staff filed Initial Posthearing Briefs. PNM and BKR filed Posthearing Response Briefs.

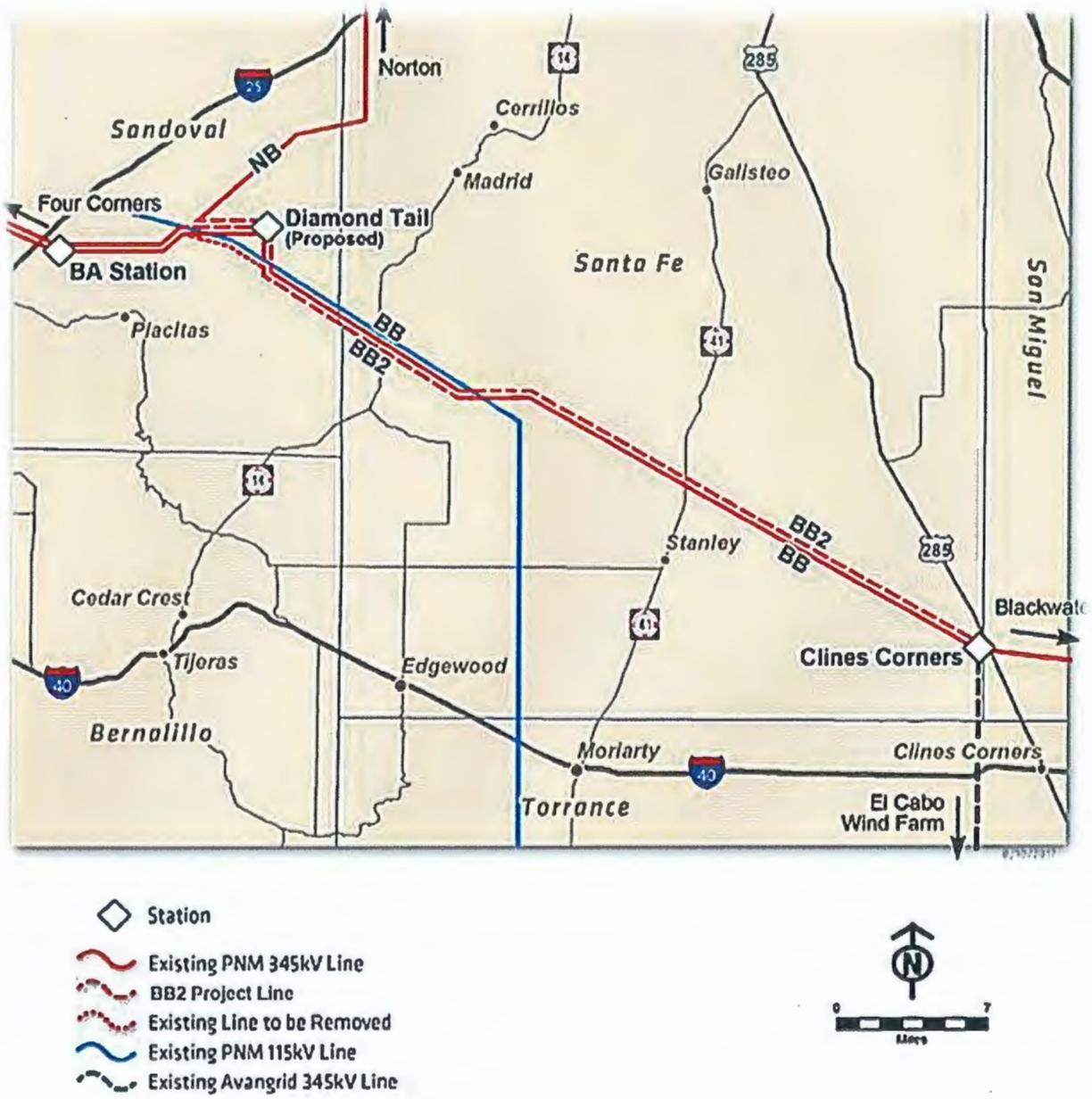
## **II. SUMMARY OF (1) PNM'S APPLICATION; (2) PARTIES' POSITIONS; AND (3) HEARING EXAMINER'S RECOMMENDATIONS**

### **A. PNM'S APPLICATION**

PNM seeks a certificate of public convenience and necessary (CCN), location approval and a determination of right-of-way width to construct and operate a 345 kilovolt (kV) transmission line and associated facilities, referred to as the Proposed BB2 Project. PNM also seeks approval of its proposed ratemaking treatment for the Proposed BB2 Project.

The BB2 Project, which would run adjacent to PNM's existing BB Line, would be located on lands in Santa Fe and Sandoval Counties owned primarily by private landowners. A few

miles would be located on state land managed by the New Mexico State Land Office. The map below shows the location of the Proposed BB2 Project.



In New Mexico, wind resources are concentrated in the eastern part of the State. To reach the PNM system and the western energy market, these wind resources need access to the interstate transmission network. The following wind farms have already been developed in eastern New Mexico: the New Mexico Wind Energy Center; Aragonne Mesa; Broadview; El Cabo;

and Casa Mesa. These existing wind farms interconnect to PNM's BB Line, which has a maximum capacity of 1,000 megawatts (MWs) and is fully subscribed. With the BB Line fully subscribed, PNM cannot offer additional transmission service even if existing interconnected wind farms can produce more power.

The maximum capacity of the BB2 Line is 362 MW, and PNM has already committed the entire 362 MW of capacity to Avangrid Renewables, LLC, a PNM wholesale transmission service customer who does not purchase electricity from PNM but purchases transmission service from PNM to move Avangrid's own energy.

In Case No. 16-00191-UT, the Commission approved a Special Service Contract (SSC) between PNM and Facebook that requires PNM to procure sufficient renewable energy to meet Facebook's load as it increases over time at its Data Center in Los Lunas. In Case No. 18-00009-UT, the Commission approved a purchased power agreement (PPA) between PNM and Avangrid for PNM to purchase the output of the 166 MW La Joya wind facility, to be owned and operated by Avangrid, to meet Facebook's increased load.

The BB2 Line is necessary to move power from the La Joya facility to PNM's system. Of the total 362 MW of capacity of the Proposed BB2 Line, 166 MW would be used to deliver wind energy from the La Joya wind farm. The remaining 196 MW of capacity would be used to deliver energy from future wind farms developed by Avangrid. The diagram below shows the location of the existing wind farms, the La Joya wind farm, the existing BB Line and the proposed BB2 Project:



The BB2 Line would be built to meet the needs of only two PNM customers: Facebook and Avangrid. Of the total 362 MW of capacity of the BB2 Line, 166 MW is dedicated to serving the needs of one PNM retail customer: Facebook. None of the BB2 Line capacity is needed to meet the needs of PNM's other retail customers. The only reason that PNM is pursuing the BB2 Project "is because of the transmission commitments that have been made on it." PNM would have not have pursued the BB2 Line solely to enhance the reliability of its system and provide backup for the BB Line.

## B. PARTIES IN THE CASE

The parties are Bill King Ranch (BKR), the Coalition for Clean Affordable Energy (CCAE), the New Mexico Industrial Energy Consumers (NMIEC) and Staff. However, CCAE and NMIEC did not participate and did not file briefs stating their positions.

## C. BKR'S PRIMARY ARGUMENT

PNM seeks to acquire 6.25 miles, or 113 to 114 acres, of BKR for the BB2 Project, equal to about 1.3% of BKR's holdings in the area. BKR has not granted PNM an easement for a right-of-way. PNM and BKR representatives met or spoke ten or more times between June and

September 2018. PNM and BKR attended a mediation on December 18, 2018, but did not reach an agreement. BKR opposes approval of PNM's Application.

BKR's most strenuous objection to the Application is that, allegedly, "PNM, Avangrid and Facebook are cooperating to misuse PNM's limited power to condemn." BKR says that Facebook has been technically identified as a PNM retail customer through its SSC with PNM, but is, in reality, Avangrid's customer. BKR argues that the Legislature granted PNM condemnation power to benefit its retail customers, but that the BB2 Project "is being constructed for Avangrid." BKR argues that it is Avangrid, who does not have condemnation power, who should be required to obtain easements from property owners, and that PNM should not be allowed to use its condemnation authority to acquire private property for a transmission line that benefits only Avangrid and Facebook. BKR is not asking the Commission to decide the amount that PNM should pay it for a right-of-way.

To the extent that BKR asks the Commission to deny PNM's Application to prevent PNM from exercising its condemnation power, the Commission lacks such authority. The proper remedy available to BKR to prevent PNM from exercising its power of condemnation is to seek a change in state law. However, rejection of BKR's argument does not dismiss BKR's legitimate concern that blanket approval of the Application would be unfair to PNM's retail ratepayers other than Facebook, as shown below.

## **D. PNM'S REQUEST FOR A CCN**

The Public Utility Act (PUA) requires a public utility to obtain a CCN before constructing or operating any public utility plant or system, including a transmission line. To obtain a CCN, a utility must show that it needs the additional capacity to be provided by the proposed plant and that the proposed plant is the most cost effective among feasible alternatives.

BKR did not state a position on PNM's request for a CCN, but urges the Commission to deny PNM's Application. Staff recommends that the Commission issue a CCN.

PNM has shown that it needs the additional capacity of the Proposed BB2 Project to serve Facebook's expanded load and that the BB2 Project is the most cost effective project among feasible alternatives. Therefore, the Commission should issue a CCN for the Proposed BB2 Project.

## **E. PNM'S REQUEST FOR LOCATION APPROVAL**

The PUA requires public utilities to obtain location approval to construct transmission lines and associated substation facilities in New Mexico that are designed for, or capable of, operating at 230 kV or more. The Commission shall approve an application for the location of transmission lines and associated facilities unless it finds that the proposed facilities will unduly impair important environmental values.

BKR opposes PNM's request for location approval, arguing that granting the request would be premature and that PNM has not shown that the Proposed BB2 Project would not unduly impair important environmental values. Staff recommends that the Commission grant location approval.

PNM has shown that the Proposed BB2 Project would not impair important environmental values, and the Commission should grant location approval.

## **F. PNM'S REQUEST FOR RIGHT-OF-WAY WIDTH DETERMINATION**

Under the PUA, no person shall begin construction of a transmission line requiring a right-of-way width greater than 100 feet without first obtaining from the Commission "a determination of the necessary right-of-way width to construct and maintain the transmission line." PNM asks the Commission to determine that a maximum 150 foot right-of-way width is necessary.

BKR argues that PNM has not shown that a 150 foot right-of-way width would safely support the BB2 Line. Staff recommends that the Commission approve PNM's request for a determination that a maximum 150 foot right-of-way width is necessary.

PNM said that the maximum distance between towers (the span length) for the Proposed BB2 Line would be 1760 feet. *Under wind blowout conditions*, for a DBD-1901 tower, which PNM proposes to use, and a span length of 1760 feet, a 150 foot right-of-way width would comply with the National Electric Safety Code (NESC). However, *under extreme wind conditions*, a right-of-way width of 200 feet is necessary to comply with the NESC. In recent cases, the Commission has determined necessary right-of-way widths based on extreme wind conditions. Therefore, PNM's request that the Commission determine that a maximum 150 foot right-of-way width is necessary should be rejected, and the Commission should determine that a 200 foot right-of-way width is necessary. This does not mean that PNM must obtain a 200 foot right-of-way width for the entire BB2 Line; it means that PNM must comply with NESC requirements for an extreme wind condition for all sections of the Line.

## **G. PNM'S REQUEST FOR RATEMAKING TREATMENT**

A public utility may, in its application for a CCN, request that the Commission determine the ratemaking principles and treatment for the facilities for which a CCN is requested. If such a request is made, the Commission shall set forth the ratemaking principles and treatment that will apply to the facilities in rate cases.

PNM requests ratemaking treatment for the Proposed BB2 Project. The estimated cost of the BB2 Project is \$85 million. The estimated revenue requirement of the BB2 Project (both wholesale/FERC and retail) is \$10.5 million. The revenue requirement is less than the cost of the Project, and is the annual amount that PNM would recover from ratepayers for the Project. PNM requests authority to recover from its New Mexico retail customers, in a future rate case,

an estimated \$5.4 million for the BB2 Project, which is the estimated retail allocation of the revenue requirement.

BKR opposes PNM's request. Staff supports it.

PNM's request for ratemaking treatment should be denied because approving it would preclude the Commission from enforcing the Special Service Contract (SSC) between PNM and Facebook and ordering Facebook to directly reimburse PNM for costs of the Proposed BB2 Project.

In Case No. 16-00191-UT, in which the Commission approved the SSC between PNM and Facebook, PNM witnesses said "*that Facebook does not wish, and has not requested, that the cost of the electric service for its data center be subsidized by any other customers.*"

Section 3.3 of the SSC ensures that other retail customers do not subsidize the cost of transmission system upgrades necessary to meet Facebook's increased load. Section 3.3 states:

Electric Facilities. Transmission system upgrades will be required to provide electric service to meet Customer load, the costs of which shall be recovered by PNM through direct reimbursement by Customer under a separate Electric Facilities Agreement between Customer and PNM. Other transmission facility upgrades to PNM's transmission system that may be required to serve additional Customer load, and associated costs, shall be addressed in separate electric facilities agreements between PNM and Customer.

Facebook has previously paid up front for the cost of an extension of PNM's 115 kV system necessary to serve the Data Center site. However, PNM did not ask Facebook to pay for costs of the BB2 Project up front pursuant to Section 3.3 of the SSC. PNM said that Facebook is not required to directly reimburse PNM for costs of the BB2 Project because the Project is a system improvement that will benefit all customers.

To the contrary, the Proposed Project is not necessary to serve any retail customers other than Facebook. It is necessary to serve Facebook because expansion of the Facebook Data Center necessitated the La Joya PPA, and the BB2 Project is necessary to move the energy from the La Joya wind facility to PNM's system.

Once electrons enter PNM’s system, they cannot be traced. Therefore, while the La Joya energy may be delivered to PNM retail customers other than Facebook, that energy is not necessary to serve them, nor is the Proposed BB2 Project. PNM witness Mechenbier repeatedly said that capacity of the Proposed BB2 Project would only “serve” one retail customer: Facebook. *See infra* pp. 57-59. The only PNM retail customer that the Proposed BB2 Project is necessary to serve is Facebook, and Facebook agreed in the SSC to directly reimburse PNM for costs of transmission system upgrades necessary to provide electric service to meet its load. The SSC was approved by the Commission and became a Commission order, and the Commission may use all of its available authority to enforce that Order. Under generally accepted principles of cost causation, Facebook should be required to directly reimburse PNM for 45.9% of the costs of the Project ( $166 \text{ MW} \div 362 \text{ MW}$ ), or an estimated \$39,015,459 ( $\$85,001,000 \times 45.9\%$ ).<sup>2</sup>

The ratemaking principles and treatment that should apply to the BB2 Project once it is placed in service are that PNM should not be allowed to recover any cost of the Proposed BB2 Project from retail ratepayers other than Facebook unless and until otherwise ordered by the Commission. Therefore, PNM’s requested ratemaking treatment should be denied.

### **III. BILL KING RANCH’S PRIMARY ARGUMENT**

Bill King, who is BKR’s witness, is the owner of BKR. Tr. 2-4-19 at 257 (King). PNM seeks to acquire 6.25 miles, or 113 to 114 acres, of the BKR for the BB2 Project, equal to about 1.3% of BKR’s holdings in the area. *Id.* at 120 (Campbell); Campbell Rebuttal at 2. BKR has not granted PNM an easement for a right-of-way. PNM representatives and BKR representatives met or spoke ten or more times between June and September 2018. Campbell Rebuttal at 4. PNM and BKR attended a mediation on December 18, 2018, but did not reach an agreement. Mediator Report (12-18-18). BKR opposes approval of PNM’s Application.

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<sup>2</sup> This is an estimated amount. The actual amount likely would not include AFUDC and might have to be grossed-up for taxes among other possible adjustments.

BKR's most strenuous objection to the Application is that, allegedly, "PNM, Avangrid and Facebook are cooperating to misuse PNM's limited power to condemn." BKR's Initial Posthearing Brief at 2. BKR argues that the Legislature granted PNM condemnation power to benefit its retail customers, but that the BB2 Project "is being constructed for Avangrid." *Id.* BKR says that Facebook has been technically identified as a PNM retail customer through its SSC with PNM, but is, in reality, Avangrid's customer. *Id.* at 2-3, 9.

BKR quotes much testimony from the hearing to illustrate how PNM allegedly is misusing the Commission's ratemaking process to enable PNM to use its condemnation power "for the sole benefit of two private entities and not New Mexico's retail customers." *Id.* at 4, 10. BKR argues that it is Avangrid, who does not have condemnation power, who should be required to obtain easements from property owners, and that PNM should not be allowed to use its condemnation authority to acquire private property for a transmission line that benefits only Avangrid and Facebook. *Id.* at 10-11. It further argues that PNM "is serving as a front for Avangrid and Facebook to obtain private land . . . at bargain-basement-low prices." *Id.* at 12.

Bill King clarified that BKR is not asking the Commission to decide the amount that PNM should pay it for a right-of-way. Tr. 2-4-19 at 274, 278 (King). He said:

In think my interest in this line is the fact that I do not feel that electric lines that are used to carry FERC power to wholesale customers in California should be eligible for condemnation under the New Mexico law. I think condemnation was meant to serve the retail customers.

*Id.* at 274.

To the extent that BKR asks the Commission to deny PNM's Application to prevent PNM from exercising its condemnation power, the Commission lacks such authority. "It is well settled that the power of eminent domain may be delegated by the legislature to a private corporation, such as a utility which serves the public." *North v. Public Serv. Co.*, 1983-NMCA-124, ¶ 16, 101 N.M. 222. The New Mexico Legislature delegated the power of eminent domain to public utilities through Section 62-1-4. *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 1979-NMSC-

023, ¶ 12, 92 N.M. 581 (“Among the powers granted to a public utility in ss 62-1-1 and 62-1-4 is the power of eminent domain.”). Section 62-1-4 states in part, “If a corporation cannot agree with the owners as to a right-of-way or the compensation for a right-of-way, the corporation may proceed to obtain the right-of-way in the manner provided by law for condemnation of such property.”

In *United Water v. New Mexico Public Utility Commission*, the New Mexico Supreme Court made clear that the Commission has no authority over condemnation actions. *United Water New Mexico, Inc. v. New Mexico Pub. Regulation Comm'n*, 1996-NMSC-007, ¶ 26, 121 N.M. 272. The Court vacated a Commission order that blocked the City of Rio Rancho’s condemnation and acquisition of Rio Rancho Utilities Corporation (RRUC), a public utility. A district court had approved the condemnation and a stipulated amount of just compensation. Following that, the Commission ordered RRUC to file an application for approval of the sale and abandonment of its water and sewer systems. In its final order, the Commission concluded that it had jurisdiction over the transfer and denied RRUC’s application for approval of the transfer as not being in the public interest. *Id.* ¶¶ 2-7. The Commission said that, regardless of the trial court’s decision, RRUC had to petition for and receive Commission approval before the condemnation transfer could be completed. *Id.* ¶ 11.

The Supreme Court held that the Commission had no jurisdiction over the transfer. *Id.* ¶ 7. It said that the Commission’s statutory authority over utility-related sales and abandonments applied only to voluntary sales and abandonments. *Id.* ¶ 16. The Supreme Court rejected the Commission’s argument that the Commission and the district court had concurrent jurisdiction over condemnation actions for public utilities. The Commission had argued that the district court would initially determine if the municipality has the right to condemn the public utility’s systems and, if so, the court would calculate the amount of just compensation to be paid. Then, the Commission argued, it would have authority to determine if the amount of compensation to be paid is in the public interest and to approve or deny the transfer based on that determination.

*Id.* ¶ 27. In rejecting the Commission’s argument, the Court declared, “The determination of what constitutes just compensation, however, is a judicial function. . . . The amount of just compensation cannot be limited by an administrative agency either directly or indirectly.” *Id.* ¶ 28.

Moreover, the New Mexico Supreme Court’s opinion in *Sandel v. New Mexico Public Utility Commission* compels the conclusion that this Commission lacks power to prohibit PNM from exercising its statutory right of condemnation. In *Sandel*, the Commission issued an order that would have had the end result of deregulating the retail side of the electric power industry, contrary to the Public Utility Act’s traditional regulation of public utilities. The Supreme Court held that the Commission’s order exceeded its authority and violated state constitutional provisions requiring separation of powers by effectively deregulating the retail side of the electric power industry in the absence of a statutory mandate from the Legislature. *Sandel v. New Mexico Pub. Util. Comm’n*, 1999-NMSC-019, ¶ 26, 127 N.M. 272. While the Supreme Court recognized the Commission’s limited power to make policy, it concluded that the Commission had gone beyond the law it was charged with administering and modified existing law and created new law on its own. *Id.* ¶¶ 12, 27. The Court noted that changes that had taken place in the regulation of the electric power industry at the federal level did not give the Commission the authority “to erase the NMPUA as it is presently written.” *Id.* ¶ 16.

“The granting of the power of eminent domain, and the parameters thereto, is a matter of public policy for the Legislature’s determination.” *El Paso Elec. Co. v. Real Estate Mart*, 1979-NMSC-023, ¶ 17. The proper remedy available to BKR to prevent PNM from exercising its power of condemnation is to seek a change in state law. *See id.* (reversing district court’s order that permitted plaintiffs to condemn two 100 foot easements contrary to a previous version of Section 62-1-4 that prohibited easements exceeding 100 feet, and stating that plaintiffs’ remedy was a change in legislation).

The rejection of BKR’s argument does not dismiss BKR’s legitimate concern that blanket approval of the Application would be unfair to PNM’s retail ratepayers other than Facebook. This concern is relevant to whether PNM has established a need for the BB2 Project and whether PNM’s request for ratemaking treatment should be approved, and is discussed in *infra* Sections IV(E) & VII(E).

## **IV. PNM’S REQUEST FOR CCN**

### **A. STATUTORY REQUIREMENTS FOR CCN APPROVAL**

The PUA requires a public utility to obtain a certificate of public convenience and necessity (CCN) before constructing or operating any public utility plant or system. NMSA 1978, § 62-9-1(A) (2005). In determining whether any certificate shall issue, the Commission shall give due regard to public convenience and necessity. *Id.*, § 62-9-6. The “public convenience and necessity” standard implies a net public benefit. *Re Valle Vista Water Utility Co.*, 212 P.U.R. 4<sup>th</sup> 305 (2001). The Commission has equated the “public convenience and necessity” with the public interest. *Re Public Serv. Co. of N.M.*, 119 P.U.R. 4<sup>th</sup> 48, 50 (1990), *aff’d, Public Serv. Co. of N.M. v. New Mexico Pub. Serv. Comm’n*, 1991-NMSC-083, 112 N.M. 379. In cases in which a utility requests a CCN for generation not to be used toward compliance with the Renewable Portfolio Standard, the “public convenience and necessity” standard requires a utility to show that it needs the additional capacity to be provided by the proposed plant. *E.g.*, Case No. 11-00313-UT, Certification of Stipulation at 11-14, 19 (1-3-12), adopted by Final Order Approving Certification of Stipulation (2-7-12); Case No. 2717, Final Order at 5-8, 10-11 (3-5-97).

Additionally, a utility must show that the facility it proposes is the most cost effective among feasible alternatives. Case No. 15-00205-UT, Order Partially Granting PNM Motion to Vacate and Addressing Joint Motion to Dismiss at 10-11 (12-22-15). A reasonable utility must consider alternatives before going forward with a project, and a new facility will not be approved

if a better alternative is available. Case No. 15-00261-UT, Corrected Recommended Decision at 96 (8-15-16), adopted in relevant part by Final Order Partially Adopting Corrected Recommended Decision (9-28-16). In Case No. 2382, the Commission rejected PNM's request for a CCN for the Ojo Line Extension (OLE) because "PNM's alternatives analysis [was] not sufficiently reliable to determine whether OLE is in fact the best alternative among those presented by PNM." Recommended Decision at 98 (7-5-95), adopted by Final Order (11-20-95). The Commission said, "Thus even assuming a need on the transmission system for the sake of argument, the Commission remains unconvinced that the public convenience and necessity require or will require the OLE Project as the proper response to such a need." *Id.* at 102. The Commission recognized its authority to examine alternatives to needs identified by a utility, that there may be various solutions for such needs, and that it would not be in the public interest for the Commission to grant a CCN for a proposed project that might meet needs but is the worst among a range of alternatives. *Id.* at 49.

## **B. PNM'S EVIDENCE IN SUPPORT OF REQUEST FOR CCN**

### ***1. Need for Proposed BB2 Project***

PNM says that the BB2 Project is needed to accommodate a particular customer request for transmission service by Avangrid Renewables, LLC (Avangrid) under PNM's Open Access Transmission Tariff (OATT). Mechenbier Direct at 11. PNM witness Mechenbier testified that PNM has an obligation under the OATT to build out its transmission system to provide transmission service to wholesale renewable power generators who ask to interconnect under PNM's OATT. *Id.* at 10; Tr. 1-16-19 at 103. Avangrid develops and operates wind energy projects in the United States. Avangrid is not a PNM retail customer, but an eligible transmission customer under PNM's OATT who does not purchase electricity from PNM but purchases transmission service from PNM to move Avangrid's own energy. *Id.* at 27, 35 (Mechenbier).

## **2. Consideration of Alternatives**

PNM considered alternatives to the Proposed BB2 Project including building no new transmission line. PNM rejected the no new construction alternative because no additional wind generation can be accommodated in the area where the La Joya wind facility is to be located without adding a new transmission circuit. *Mechenbier Direct at 17-18.*

All alternatives that would add a new transmission circuit would require a new 345 kV transmission corridor. The shortest effective alternative to the BB2 Project would be similar in length and would need to be routed through the mountains east of Albuquerque to PNM's Sandia switching station southeast of Albuquerque. Additional permitting would be required to locate a line through the Interstate 40 corridor in Tijeras Canyon, which would move the in-service date well beyond the in-service date required by Avangrid. Also, the cost of routing a line through areas with significant congestion and populations would be much greater. *Id. at 18.*

A feasible alternative could be running a line from Torrance County south of the Manzano Mountains north to the existing PNM Rio Puerco Switching Station. However, such a line would require permitting a new corridor more than three times the length of the BB2 Project, exceeding the projected BB2 Project cost by two to three times. *Id. at 18-19.*

PNM said that a lower voltage project was not a feasible alternative because it would not provide sufficient capacity. Expanding the capacity of the existing BB Line is not a feasible alternative because thermal limits of the conductor have been reached for the Line. Reconductoring the BB Line also is not a feasible alternative because of the existing transmission obligations on the Line and the length of the outage required to reconduct the Line. *Id. at 19.*

## **C. REQUIREMENTS FROM CASE NO. 2382**

In Case No. 2382, the Commission rejected PNM's request for a CCN for the proposed Ojo Line Extension Project. In its decision, the Commission ordered PNM, in future

applications for approval to construct major plant additions to address its transmission system, to address listed matters. Case No. 2382, Recommended Decision at 104. PNM addressed the required matters, as follows:

***1. All efforts to collaborate with interested constituents and reach a consensus, and the results of such efforts***

PNM conducted public outreach about the BB2 Project and held 11 meetings with interested constituents. PNM used the Utility Search Conference (USC) process, a model used nationwide to bring together utilities and stakeholders to address their respective needs. The goal is to identify recommendations that all stakeholders can support. USC meetings were held on March 8 and 9, 2018, and 30 stakeholders participated. Discussions were facilitated by STAR Group, LLC, an independent consulting firm. Participants made recommendations to PNM representatives, who reviewed the recommendations and advised the participants of PNM's ability to incorporate the recommendations. PNM formed a Community Working Group from a subset of individuals who participated in the USC to continue to address issues through ongoing meetings and discussion. Additionally, PNM held a Pre-Application Neighborhood Meeting and individual meetings with property owners and their representatives. The BB2 Project incorporates public support for locating the BB2 Line adjacent to the existing BB Line and property owners' preference for H-frame steel pole structure design and shape and galvanized pole surface color to reduce visibility. Campbell Direct at 10-13; Exh. DC-8 to Campbell Direct.

***2. The ramifications of any increase in PNM's ability to wheel into its service area***

PNM would be able to accommodate 362 MW of additional wind farm generation from eastern New Mexico to PNM northern New Mexico load centers after completion of the Proposed Project. Mechelenbier Direct at 24.

**3. The current status of any other projects or planned projects which would significantly affect the transmission grid, and how such projects affect the current application**

System improvements and upgrades include installation of a Static Var Compensator for voltage support at Guadalupe 345 kV Switching Station which went into service in March 2018. PNM is currently installing a synchronous condenser<sup>3</sup> at Blackwater Station, which is expected to be operational in March of 2019. The synchronous condenser provides voltage and dynamic support to allow the remaining 200 MW of capacity in the existing BB Line to be used for transmission service for the Grady wind farm, bringing the total transmission service on the line to 1,000 MW. These projects do not affect the Proposed BB2 Project, which is separately proposed to accommodate customer requests for transmission service beyond the 1,000 MW already allocated. *Id.* at 25.

In addition, PNM has completed technical studies for both the Western Spirit and Verde merchant transmission projects. These projects have a wires-to-wires interconnection agreement with PNM that allow them to be interconnected to PNM's transmission system. Neither project would address the identified Clines Corner transmission limitations, nor are these projects anticipated to be in service when required by the end of 2020. *Id.* at 25.

**4. The current status of any plans to change the ownership or operation of significant portions of the New Mexico transmission grid and how such change would affect the current application**

PNM has no plans, and is not aware of any plans, to change ownership of significant portions of the New Mexico transmission grid. *Id.* at 27.

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<sup>3</sup> A synchronous condenser is essentially a generator without the turbine to provide synchronous current compensation.

**5. How PNM's transmission needs have been integrated with PNM's generation/power purchase plans and needs, including how such transmission will affect or be affected by present or future generation configurations**

The Proposed BB2 Project would support and expand PNM's 345 kV transmission system that is in place today in northern New Mexico and was developed in the late 1960s and early 1970s. The last PNM 345 kV transmission line was completed in 1985 when PNM constructed the BB Line. Since that time, PNM focused its efforts on transmission reinforcements that maximized using existing northern New Mexico system transmission lines including building load-side generation resources. *Id.* at 27.

**6. If the project is to benefit the Department of Energy, Los Alamos National Laboratory or Los Alamos County, updates to their load growth or shrinkage**

The Proposed BB2 Project is not needed to benefit the Department of Energy, Los Alamos National Laboratory or Los Alamos County. *Id.* at 27-28.

**7. Progress on and analysis of all reasonable alternatives to the current application**

PNM performed an analysis of reasonable alternatives. See *supra* § IV(B)(2).

**8. All assumptions to which PNM's proposal is significantly sensitive**

Not applicable. The proposed 362 MW of transmission capacity is already committed. Mechenbier Direct at 27-28.

## **D. PARTIES' POSITIONS ON PNM'S REQUEST FOR CCN**

BKR does not state a position on PNM's request for a CCN, but urges the Commission to deny PNM's Application. BKR's Initial Posthearing Brief at 20.

Staff concluded that PNM met the statutory and regulatory requirements for issuance of a CCN, and Staff recommends that the Commission issue a CCN subject to the following conditions, which are unopposed by PNM:

1. PNM shall file copies of all construction permits received for the BB2 Project within two weeks of receipt.
2. PNM shall file a summary of the actual cost of the BB2 Project for comparison to PNM's Exhibit JRM-9 on Page 11 of Appendix A within 60 days after all final costs have been incurred and cleared the accounting system.
3. PNM shall file a notice of the date that the BB2 Project is placed into service.

Sidler Direct at 3, 13-16; Sidler 1-9-19 Supp. at 3.

## **E. HEARING EXAMINER'S RECOMMENDATION ON PNM'S REQUEST FOR CCN**

Typically, in CCN cases, a utility establishes the need for proposed public utility plant or system by showing that it is needed to meet the utility's peak demand plus reserve margin.<sup>4</sup> The capacity of the Proposed BB2 Project is not needed to meet PNM's peak demand. The only reason that PNM is pursuing the BB2 Project "is because of the transmission commitments that have been made on it." Tr. 1-16-19 at 113-14 (Mechenbier). PNM would have not have pursued

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<sup>4</sup> E.g., Case No. 12-00317-UT, Recommended Decision at 31 (11-1-12) (finding that El Paso Electric Company (EPE) required additional generating resources to meet load growth and reserve margin), adopted by Final Order Adopting Recommended Decision (1-23-13); Case No. 11-00313-UT, Certification of Stipulation at 19 (finding that Southwestern Public Service Company (SPS) required additional generating resources to provide adequate and reliable service and provide an adequate reserve margin), adopted by Final Order Approving Certification of Stipulation (2-7-12); Case No. 10-00301-UT, Certification of Stipulation at 21 (6-23-11) (finding that EPE required additional generating resources to meet load growth and provide an adequate reserve margin), adopted by Final Order Adopting Certification of Stipulation (6-23-11).

the BB2 Line solely to enhance the reliability of its system and provide backup for the BB Line. *Id.* at 114 (Mechenbier). It is questionable whether, in the context of a utility's request for a CCN, a transmission line is "necessary" when it is being built only to accommodate a request by a transmission customer to move its own energy.<sup>5</sup> In recent cases, independent transmission project companies and wind project developers have themselves requested location approval of transmission lines from the Commission, obviating the need for a utility to request a CCN.<sup>6</sup> However, it is unnecessary to decide this issue because the BB2 Project is necessary for PNM to serve the increased demand of Facebook, a retail customer, through renewable energy under the SSC, and the SSC was approved by the Commission. PNM stated in Case No. 18-00009-UT that the La Joya PPA was necessary for, and would be used by, PNM to provide service to Facebook under the SSC, Rate No. 36B and Rate Rider No. 47. Case No. 18-00009-UT, Final Order at 8, ¶ 24. The existing BB Line is the only existing transmission facility in the area of where the La Joya facility will be located, and it is fully subscribed. Mechenbier Direct at 17. The BB2 Line is necessary to move power from the La Joya facility to PNM's system. *Id.* at 12; Case No. 18-00009-UT, Final Order at 18-19, ¶ 47.

Therefore, PNM has demonstrated by a preponderance of the evidence<sup>7</sup> that it needs the additional capacity to be provided by the BB2 Project. It has also shown by a preponderance of

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<sup>5</sup> The Hearing Examiner also questions whether PNM has an obligation under the OATT to build a new transmission line solely upon request of a transmission customer. PNM made this assertion, but cited to no section of the OATT to support the assertion. PNM's OATT was not moved or admitted into evidence.

<sup>6</sup> Case No. 18-00049-UT (Zia Transmission, LLC); Case No. 18-00065-UT (Corona Wind Companies); Case No. 17-00040-UT (Southline Transmission, LLC). In Case No. 17-00040-UT, the Commission described the project as a merchant transmission project, which differs from a traditional utility project in that all development costs of the project are borne by the sponsor who does not have captive ratepayers from which to recover the costs of the project. Case No. 17-00040-UT, Certification of Stipulation at 8 n.7 (8-7-17), adopted by Final Order Approving Stipulation (8-30-17).

<sup>7</sup> The standard of proof in administrative adjudications is, unless expressly provided otherwise, the preponderance of the evidence. Case No. 12-00131-UT, Recommended Decision at 16 (11-7-12), adopted in relevant part by Final Order (12-11-12). Preponderance of the evidence means the greater weight of the evidence. *Campbell v. Campbell*, 1957-NMSC-001, ¶ 24, 62 N.M. 330. It is evidence that, when weighed with that opposed to it, has more convincing force. It has superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. *Black's Law Dictionary* 547 (2<sup>nd</sup> pocket ed. 2001).

the evidence that the BB2 Line is the most cost effective project among feasible alternatives and that it has complied with the requirements of Case No. 2382. Accordingly, PNM's request for a CCN should be granted.

## **V. PNM'S REQUEST FOR LOCATION APPROVAL**

### **A. STATUTORY AND REGULATORY REQUIREMENTS FOR APPROVAL**

The PUA requires public utilities to obtain location approval to construct transmission lines and associated substation facilities in New Mexico that are designed for, or capable of, operating at 230 kV or more. NMSA 1978, § 62-9-3 (2005). The Commission shall approve an application for location of transmission lines and associated facilities unless it finds that the proposed facilities will unduly impair important environmental values. *Id.*, § 62-9-3(F). In determining whether a proposed transmission line would unduly impair important environmental values, the Commission may consider: (1) existing plans of the state, local government and private entities for other development at or in the vicinity of the proposed location; (2) fish, wildlife and plant life; (3) noise emission levels and interference with communications signals; (4) the proposed availability of the location to the public for recreational purposes, consistent with safety considerations and regulations; (5) existing scenic areas, historic, cultural or religious sites and structures or archeological sites at or near the vicinity of the proposed location; and (6) additional factors that require consideration under applicable federal and state law pertaining to the location. *Id.*, § 62-9-3(M). The Commission shall not approve an application if it violates a state, county or municipal land use statutory or administrative regulation unless the Commission finds that the regulation is unreasonably restrictive and compliance is not in the interest of the public convenience and necessity. *Id.*, § 62-9-3(G).

To implement Section 62-9-3, the Commission adopted 17.9.592 NMAC, which states that an application for location approval shall contain:

- A. A description of the transmission line;
- B. Identification of all applicable land use statutes and administrative regulations and proof of compliance or statement of noncompliance with each;
- C. If required under the National Environmental Policy Act (NEPA), an environmental assessment;
- D. If required under NEPA, an environmental impact statement and record of decision or a finding of no significant impact;
- E. If preparation of a federal environmental assessment or environmental impact statement is not required, then a report, comparable to an environmental impact statement;
- F. All written federal, state and local environmental authorizations necessary to begin construction of the transmission line;
- G. All written federal, state and local environmental authorizations necessary to begin operation of the transmission line or proof of application for such authorization;
- H. Testimony demonstrating that the transmission line will not unduly impair important environmental values, which include but are not limited to, preservation of air and water quality, land uses, soils, flora and fauna, and water, mineral, socioeconomic, cultural, historic, religious, visual, geologic and geographic resources;
- I. The expected date that the transmission line will be online;
- J. Proof that the application has been served on all local authorities in each county and township where the transmission line will be located, the New Mexico Attorney General, the New Mexico Environment Department and the New Mexico State Engineer; and
- K. Any other information which the applicant wishes to submit.

17.9.592.10 NMAC.

## **B. PNM'S EVIDENCE IN SUPPORT OF ITS REQUEST FOR LOCATION APPROVAL**

PNM submitted the following information to meet the requirements of Section 62-9-3 and 17.9.592 NMAC:

### ***1. Description of Transmission Line (17.9.592.10(A))***

#### ***a. Location of Transmission Line***

As the map in *infra* Section V(B)(1)(e) shows, the proposed BB2 Project would be located in Santa Fe and Sandoval Counties and would originate at the PNM Clines Corner 345 kV Switching Station and proceed west for about 45 miles to a point of interconnection with the existing PNM Norton-BA NB 345 kV Line.

The BB2 Project would consist of about 45 miles of utility corridor within a 150-foot wide right-of-way and 40-acre switching station. In total, about 812 acres would be part of the right-of-way. Exh. DC-5 at 26, to Campbell Direct.

#### ***b. Identification of Ownership of the Land the Transmission Line Will Cross and the Number of Feet the Transmission Line Will Cross Over Each Owner's Land***

The table below identifies the ownership of the land that the BB2 Line would cross and the number of feet it would cross over each type of land.

<b>Ownership type</b>	<b>Approximate distance in linear feet</b>
Private	217,047
New Mexico State Trust Land	20,106
County of Santa Fe	270
New Mexico Department of Transportation	273

Campbell Direct at 6.

**c. Total Length of Each Transmission Line in Feet**

The table below states the total length of each proposed transmission line in feet.

<b>Transmission Line</b>	<b>Approximate distance in linear feet</b>
Double Circuit 345 kV Tap of NB345 kV Line	11,637
Diamond Tail Switching Station to Clines Corners switching station 345 kV single circuit	226,059

*Id.*

**d. Description of Interconnection Facilities**

The Proposed Project has four components:

1. Construction of an approximately three mile-long double-circuit 345 kv transmission line
2. Construction of a 345 kV switching station called Diamond Tail Switching Station
3. Construction of 42 miles of a single-circuit 345 kV transmission line from the new switching station east to PNM's Clines Corners 345 kV Switching Station
4. Expansion of facilities inside of the Clines Corners Switching Station

Mechanbier Direct at 13.

The 42-mile section of new line would be constructed beginning at the Clines Corner Switching Station and ending at the new proposed 345 kV Diamond Tail Switching Station. It would be located adjacent to the existing BB Line and expand an existing utility corridor. *Id.* at 14.

The three-mile transmission loop would be constructed beginning at the proposed Diamond Tail Switching Station and ending west at a point of interconnection on the NB 345 kV Line. It too would be located adjacent to the existing BB Line and expand an existing utility corridor. *Id.* at 15.

The Diamond Tail Switching Station would be located east of Interstate 25 and west of NM State Highway North 14. The Station footprint of about 25 acres would be located within a larger area of about 40 acres. If the proposed BB2 Project is approved, this new switching station would be needed to tie the existing BB Line to the new transmission lines. *Id.*

The Clines Corner Switching Station would be expanded to accommodate the new transmission line interconnection. The expansion would include adding four 345 kV circuit breakers, developing a new line terminal position and converting from a ring-bus to a breaker-and-half station configuration. Expansion would occur within the footprint of the existing Station. *Id.* at 13-14.

#### e. Map Showing Location of Transmission Line

The map below shows the location of the proposed BB2 Project:



Exh. JRM-6 to Mechanbier Direct.

***f. Schematic Diagram Showing the Transmission Line and the Interconnection of the Transmission Line to the Transmission Grid***

Exhibit JRM-7 to Jeff Mechenbier's Direct Testimony is a schematic diagram showing the proposed BB2 Project and its interconnection to the transmission grid.

***2. Identification of Applicable Land Use Statutes and Administrative Regulations and Proof of Compliance or Statement of Noncompliance with Each (17.9.592.10(B))***

***a. Santa Fe County***

The BB2 Project requires approval of a Conditional Use Permit and Site Development Plan from Santa Fe County. Exh. DC-2 at 1, to Campbell Direct. PNM has received these approvals, although BKR has appealed approval of the Conditional Use Permit. Tr. 1-16-19 at 117 (Campbell).

***b. Sandoval County***

The BB2 Project requires zone change approval (from Rural Residential/Agricultural to Special Use) from Sandoval County. Exh. DC-2 at 2, to Campbell Direct. PNM has received this approval. Tr. 1-16-19 at 149 (Campbell).

***c. New Mexico State Land Office***

The BB2 Project requires the granting of an easement by the New Mexico State Land Office. The New Mexico State Land Office has granted an easement to PNM. *Id.* at 153 (Campbell).

***d. New Mexico Department of Transportation***

The BB2 Project requires the granting of a New Mexico Public Highway Utility Accommodation Permit by the New Mexico State Highway and Transportation Department. To

obtain this Permit, PNM must submit as-built plans within 30 days of completion of the installation pertaining to the location of the facility installed. 17.4.2.12(G) NMAC. These plans will not be available before final engineering, structure placements and designs are complete. PNM will submit the plans to the Department once the BB2 Project is sufficiently developed. Exh. DC-2 at 3-4, to Campbell Direct.

### ***3. Environmental Report (17.9.592.10(C)-(E))***

The BB2 Line would not cross federal land so NEPA requirements do not apply. Campbell Direct at 7-8; Johnson Direct at 3. PNM retained Marron and Associates to prepare the PNM BB2 Transmission Line Environmental Analysis Report (EAR). The EAR (i) summarizes the purpose and need for the BB2 Project and alternatives to the Project, including a no action alternative; (ii) discusses the affected environment; (iii) examines environmental consequences of the BB2 Project; and (iv) outlines mitigation measures. Campbell Direct at 8-9. The Report is comparable to an environmental impact statement required by NEPA. Johnson Direct at 3.

### ***4. Written Federal, State and Local Environmental Authorizations Necessary to Begin Construction of the Transmission Line (17.9.592.10(F))***

PNM submitted a list of written federal, state and local environmental authorizations necessary to begin construction and the status of each. Exh. DC-3 to Campbell Direct.

### ***5. Written Federal, State and Local Environmental Authorizations Necessary to Begin Operation of the Transmission Line; if Such Authorization Cannot Be Obtained Until After Construction of the Transmission Line, Proof of Application for Such Authorization (17.9.592.10(G))***

PNM submitted a list of three written federal, state and local environmental authorizations necessary to begin operation of the transmission line. PNM has not received any of the required authorizations, and it is too early for PNM to apply. *Id.*

## ***6. Testimony Demonstrating that the Transmission Line Will Not Unduly Impair Important Environmental Values (17.9.592.10(H))***

PNM retained Marron and Associates to prepare the PNM BB2 Transmission Line Environmental Analysis Report (EAR). Marron considered all of the important environmental values identified in 17.9.592.10(H) NMAC: preservation of air and water quality, land uses, soils, flora and fauna, and water, mineral, socioeconomic, cultural, historic, religious, visual, geologic and geographic resources. Marron also specifically considered the factors listed in Section 62-9-3(M) that the Commission has not incorporated into 17.9.592 NMAC: existing plans of the state, local government and private entities for other developments at or in the vicinity of the proposed location, noise emission levels and interference with communication signals, the proposed availability of the location to the public for recreational purposes, consistent with safety considerations and regulations, and existing scenic areas or archaeological sites at or in the vicinity of the proposed location. For each of these important environmental values and factors, Marron evaluated the nature of the current environment, focusing on existing conditions, and determined whether the BB2 Project would have adverse impacts on each value. Marron proposes measures in the EAR to minimize or avoid environmental impacts where appropriate. Section 5.0 of the EAR describes these mitigation measures, including transmission line reclamation, noxious weed species, restoration success criteria and post-construction monitoring, restoration of temporary disturbance areas, erosion control, standard mitigation measures/best management practices, cultural resources, public safety and standards safety measures. Johnson Direct at 4-5.

Marron conducted field surveys to collect cultural resource, biological resource, waterway and wetland data. The cultural resource investigations included a review of known cultural resource sites including archaeological sites and historic properties. Archaeologists conducted a walking survey of the entire BB2 Project area. Cultural resource sites were recorded and mapped. For biological resources, biologists conducted a walking survey of the entire BB2 Project area. Observed plant and animal species were recorded. Signs of animal activity, such as tracks and nests, were also recorded. Protocol surveys were conducted for the gray vireo, southwestern willow flycatcher and yellow-billed cuckoo. The biologists also identified and delineated wetland areas based on the presence of wetland indicator plants species, hydric soils and wetlands hydrology. Environmental data was obtained from on-line and literature sources. Data was collected on landforms, geology, soils, surface and groundwater, wetlands vegetation, wildlife, cultural resources, climate and air quality, visual resources, communities and land use, development plans, socioeconomics and environmental justice, recreation, noise, electromagnetic fields and hazardous materials. The environmental data was used to prepare the affected environment sections of the EAR. Environmental impacts were evaluated based on the proposed action and affected environment. Opportunities to mitigate environmental impacts were identified, such as moving a structure location to avoid a cultural resource site. *Id.* at 5-6.

Rural residential and ranching are the main land uses near the BB2 Project corridor. In Sandoval County, the closest community to the BB2 Project is Algodones and is primarily scattered, sparse residential property. The closest communities to the BB2 Project in Santa Fe County are Golden and Stanley, which are also sparsely populated. Aerial surveys identified 37 dwellings and 40 non-residential structures within one mile on either side of the BB2 Project corridor. Exh. DC-5 at 10, to Campbell Direct.

The following is a summary of Marron's conclusions:

1. The location of the BB2 Project would have minimal impact on community values because it would be adjacent to the existing BB Line and structures would be located to minimize impacts to sensitive resources.
2. The BB2 Project is not expected to alter land uses or prevent current land uses because any impacted land uses are already occurring directly adjacent to an existing powerline right-of-way.
3. No parks or recreation areas would be impacted by the BB2 Project.
4. The BB2 Project would not adversely impact visual resources because it would be located next to the existing BB Line, which has already modified the landscape. Lighter galvanized color on structures would lessen visual impacts.
5. Wildlife is not abundant in the BB2 Project area. Observations totaled 67 vertebrate animal species including 49 bird species, 16 mammal species and two reptile species.
6. Threatened species identified in the BB2 Project area are the gray vireo and peregrine falcon. The BB2 Project might remove some perching trees for the gray vireo, but abundant trees are available on adjoining lands. Mitigation measures would be taken to minimize impacts to the gray vireo. The BB2 Project would not affect the peregrine falcon because no suitable nesting habitat is present within or near the Project area.
7. Potential southwestern willow flycatcher and yellow-billed cuckoo habitats are in the Project area, although none of these species was observed in the area. The southwestern willow flycatcher is a federal and state endangered species. The yellow-billed cuckoo is a federal threatened species. PNM would conduct surveys in 2019 to ensure the absence of both species. If either species is found in the area, PNM would coordinate with the U.S. Fish and Wildlife Service to develop mitigation measures.
8. No geological hazards were identified.

9. The BB2 Project would not cross any permanent surface waters, and it is not expected that construction activities would significantly impede the seasonal flow of water within the watersheds.
10. The BB2 Project is not expected to adversely affect groundwater resources.
11. In Sandoval County, 19 newly recorded historic sites, 10 previously recorded historic sites and three segments of the same historic railroad grade were found. Six previously recorded sites were not found within the BB2 Project limits. In Santa Fe County, six newly recorded sites, 10 previously recorded sites, a segment of the New Mexico Central Railroad grade and 58 isolated occurrences were recorded. Three previously recorded sites were not found. Twenty-one of the cultural resource sites were determined to be eligible to the National Register of Historic Properties (“NRHP”). Without avoidance, site treatment, consisting of excavation and documentation of site features, is recommended at 15 of the sites. As many sites as possible would be avoided by sensitive structure placement.

Johnson Direct at 6-23.

Marron concluded that the selected route of the BB2 Project would not have a significant impact on the human environment and would not unduly impair any important environmental values. *Id.* at 6. Mr. Johnson considers “unduly impairs” to mean “a large negative environmental impact.” Tr. 4-2-19 at 195.

PNM would incorporate mitigation measures throughout each phase of the BB2 Project. These mitigation measures are identified in Exhibit DC-5 to Mr. Campbell’s Direct Testimony. PNM would retain one or more environmental monitors who would be responsible for overseeing implementation of the mitigation measures. Campbell Direct at 9.

## ***7. Expected Date that the Transmission Line Will be Online***

The expected date that the BB2 Line would be online is November 2020. Mechenbier Direct at 16.

## ***8. Proof that the Application Has Been Served on All Local Authorities in Each County and Township Where the Transmission Line Will be Located, the New Mexico Attorney General, the New Mexico Environment Department and the New Mexico State Engineer***

The Certificate of Service attached to PNM's Application indicates that PNM served its Application on all required persons.

## **C. PARTIES' POSITIONS ON PNM'S REQUEST FOR LOCATION APPROVAL**

### ***1. Staff's Position***

Staff concluded that PNM met the statutory and regulatory requirements for location approval, and Staff recommends that the Commission grant PNM's request for location approval. Sidler Direct at 23-24.

### ***2. Bill King Ranch's Position***

#### ***a. Argument that Location Approval Is Premature***

As of January 16, 2019, PNM had acquired easements<sup>8</sup> for 22% of the privately-owned land. Four private landowners, including BKR, had not granted easements to PNM. Tr. 1-16-19 at 123-24 (Campbell). As of January 16, 2019, PNM was continuing negotiations with three of those four private landowners. *Id.* at 152 (Campbell). PNM and BKR attended a mediation on

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<sup>8</sup> An easement is the right or interest obtained to construct, maintain and operate transmission facilities within a right-of-way. Exh. DC-7 at 30, to Campbell Direct.

December 18, 2018, but did not reach an agreement. Mediator Report (12-18-18). PNM seeks an easement for about 6.25 miles or 113 acres from BKR. Tr. 1-16-19 at 120 (Campbell).

BKR argues that it is premature to approve PNM's Application because PNM has not acquired easements from private landowners who own a majority of the private land over which PNM must acquire rights-of-way for the BB2 Project. BKR's Initial Posthearing Brief at 12-14.

The Location Control Statute and 17.9.592 NMAC do not specifically require an applicant to acquire all of the rights-of-way for a transmission line before seeking and receiving Commission approval. Case No. 18-00049-UT, Recommended Decision at 36 (7-31-18), adopted by Final Order (9-5-18) (*SunZia Case*). Whether the lack of acquisition of rights-of-way precludes location control approval depends on the extent to which it creates uncertainty of the location of the proposed project. In the *SunZia Case*, the Commission found that the proposed location was not sufficiently final to grant location approval because right-of-ways were still needed from the Bureau of Land Management (BLM), the State Land Office and private landowners. While SunZia's Application with the Commission was pending, it also had pending before BLM a request to amend the right-of-way previously granted by the BLM. This request was necessitated by new right-of-way alignments for six properties, which in turn modified the proposed route through BLM land. SunZia also had pending its request for a right-of-way from the State Land Office for which it would have to seek route modifications if and when SunZia received BLM approval for the requested amendments. Also of significance was that the State Land Office told SunZia that it would not issue a right-of-way if any portion of the proposed transmission line on state trust land was located within a mile of any residence, without the written consent of the property owner. As of the date of the hearing, SunZia had acquired options for rights-of-way for 82% of the private land for which it needed rights-of-way. Three private landowners who were Intervenors in the case had indicated that they did not intend to grant SunZia the requested easements. If the landowners continued to refuse to grant easements, SunZia would have to either pursue an alternate route or pursue eminent domain. Both of these options were uncertain. Pursuing an

alternate route was uncertain because SunZia had not sought alternate routes to the easements it sought from two of the Intervenors, and alternate routes likely would require further negotiations with the Department of Defense and White Sands Missile Range. Pursuing eminent domain was also uncertain because SunZia itself did not have eminent domain authority. Potentially, SunZia could enter into an agreement with the New Mexico Renewable Energy Transmission Authority (RETA) to qualify the SunZia project as a RETA project, which would allow RETA to use its eminent domain authority to acquire easements from the Intervenors. This would require a formal public process which the Commission described as “uncertain and potentially time-consuming.” *SunZia Case*, Recommended Decision at 36-44. The Commission described SunZia’s application as “unique . . . for the size of the project, for the degree of opposition to the location as it has been described, the uncertainty of the locations described and the likelihood of relocation[.]” *Id.* at 34.

The Commission concluded:

Accordingly, the number and extent of the changes currently proposed and potentially required in the future create too much uncertainty for the Commission to approve a location at this time. It is not clear whether the currently proposed changes will be approved. The extent of future changes is also not clear.

*Id.* at 44.

The Commission explained that possession of eminent domain authority by an applicant is not required to obtain location approval. However, the Commission said,

It should be clear from the circumstances of this case and the opposition of the certain private landowners that without eminent domain power, SunZia’s ultimate inability to adhere [to] its chosen location for the proposed transmission line renders the need for more relocations of the proposed line location more likely.

Final Order at 10. The Commission distinguished its location approval of a transmission line proposed by Southline Transmission, LLC (Southline) over the objections of landowners/Intervenors in Case No. 17-00040-UT. Because the proposed project was a public/private endeavor between Southline and the Western Area Power Administration (WAPA), “any nonconsensual land acquisition will proceed through the exercise of WAPA’s

eminent domain powers.” Case No. 17-00040-UT, Final Order Approving Stipulation at 4, ¶ 10 (8-30-17).

PNM’s lack of acquisition of all easements over private land does not preclude location control approval because it does not create uncertainty of the location of the Proposed Project. This is because PNM has the power of eminent domain and can acquire easements from private landowners for its proposed location even if no agreements are reached with those landowners.

BKR also argues that it is premature to grant PNM location approval because PNM has not received a conditional use permit from Santa Fe County. BKR’s Initial Posthearing Brief at 14. BKR argues that “[a]s indicated in the testimony of Douglas Campbell, that matter [PNM’s request for a conditional use permit from Santa Fe County] is under review.” *Id.* at 14.

The testimony of Douglas Campbell cited to by BKR Ranch is that Santa Fe County issued a final order granting PNM a conditional use permit, but the final order had been appealed by BKR. Tr. 1-16-19 at 119. BKR’s attorney asked Mr. Campbell whether PNM had actually received a permit and further asked, “You can’t receive the permit until all of the appeal rights have run, correct?” *Id.* Mr. Campbell answered:

I’ll just respond to that by making note of earlier transmission lines that we’ve built in Santa Fe County where we’ve received the final order. And I’m not sure they actually – we actually are issued a final permit that – after that point.

*Id.* BKR’s attorney then asked Mr. Campbell, “The previous ones you’re talking about weren’t appealed, correct?” Mr. Campbell answered, “Correct.” *Id.* at 119-20.

17.9.592 NMAC requires an applicant for location approval of a transmission line to include in its application all written federal, state and local environmental authorizations necessary to begin construction of the line. 17.9.592.10(F) NMAC. Mr. Campbell’s testimony establishes that PNM received authorization from Santa Fe County through the County’s issuance of a final order granting PNM a conditional use permit. While BKR’s attorney suggested, through his cross examination, that PNM did not have authorization because the final order had been

appealed, this argument is not evidence. Rule 13-119 NMRA (“Statements of the lawyers, however, are not themselves evidence.”).

***b. Argument that PNM Has Not Shown that the Proposed BB2 Project Would Not Unduly Impair Important Environmental Values***

BKR argues that PNM has not satisfied its burden of proving that the Proposed BB2 Project would not unduly impair important environmental values. BKR’s argument appears on pages of 14-15 of its Initial Posthearing Brief where it says:

The Environmental Analysis Report commissioned by PNM acknowledges numerous impacts on wildlife — including species listed as threatened in New Mexico — and on currently pristine components of the environment. The Report does not compare alternatives or potentially mitigating measures, but instead tends to write off casualties to the environment as collateral damage. Had the Hearing Officer allowed introduction of Bill King’s exhibits, they would reveal impairment of important environmental values and the quality of life on Bill King Ranch. Even without those exhibits, however, PNM has not provided substantial evidence that its Project will not unduly impair environmental concerns, including avian habitat and noxious weeds. (Citations omitted).

This argument is conclusory, and BKR identifies no specific facts supporting its allegation.

Bill King’s prefilled Direct Testimony also is conclusory. Mr. King quotes repeatedly from a Public Service Commission (PSC) of Wisconsin publication entitled “Environmental Impacts of Transmission Lines.” The quotations identify general impacts from transmission lines. For example, one quotation is, “Locating a new transmission line ROW parallel with an existing line on separate structures can increase impacts to agricultural operations.” King Direct at 2. Another is, “Increasing the width of an existing corridor can increase edge effects and barriers to wildlife.” *Id.* However, Mr. King does not state how the Proposed BB2 Project would increase impacts to agricultural operations or increase edge effects and barriers to wildlife.

Mr. King said that PNM “has not adequately accounted for evidence of historic Native American culture. I have personally found arrowheads and pottery shards on the land.” *Id.* at 4. However, Mr. King said that he did not read the EAR. Tr. 2-4-19 at 286.

Mr. King said that the Proposed BB2 Line “would be placed almost directly over” the Miller Family Homestead. He said that the Miller Family homesteaded and built a farmhouse over 100 years ago. He said that highway contractors flagged the Homestead for historical preservation purposes and that the Site has been used for movie sets “because of its rare historical value and aesthetics.” Mr. King also said that the Site has great historical significance to him and his family because the land has been in his family for five generations and it is “more than real estate.” King Direct 3.

Eric Johnson, Senior Environmental Project Manager with Marron and Associates, described the Homestead as “an artifact scatter,” meaning debris evidencing a human presence. He testified that only a small portion of the Miller Family Homestead and artifact scatter is within the Project area. The structure on the Homestead is outside the Project area. Tr. 2-4-19 at 221-22. Mr. Campbell said that the Site, “as provided in the conditions for Santa Fe County approval of the land use, will be avoided by construction and operations and is located south of the existing BB 345 kV transmission line.” Campbell Rebuttal at 6.

It is undisputed, as the title of the Wisconsin PSC publication says, that transmission lines have environmental impacts. The key question, however, is whether PNM has shown that the Proposed BB2 Project would not “unduly impair important environmental values.” PNM, through its witnesses’ testimonies and the EAR, has shown by a preponderance of the evidence that the Proposed BB2 Project would not unduly impair important environmental values. PNM’s specific evidence is more persuasive than Mr. King’s general testimony that transmission lines have environmental impacts. Additionally, Mr. King’s testimony is less credible given that he told the Santa Fe County Planning Commission in September 2018 that he was “in favor of this project,” and that he said that he would set aside his concerns if PNM offered him sufficient annual payments for an easement. Exh. DC-1 Rebuttal at 2, to Campbell Rebuttal; Tr. 2-4-19 at 283.<sup>9</sup>

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<sup>9</sup> When faced with conflicting witness testimonies, the trier of fact determines the weight to be given to each’s testimony and to the credibility of the witnesses. *Fitzgerald v. Fitzgerald*, 1962-NMSC-028, ¶ 5, 70 N.M. 11 (rejecting appellant’s argument that trial court should have based its findings upon the testimony

## **D. HEARING EXAMINER'S RECOMMENDATION ON PNM'S REQUEST FOR LOCATION APPROVAL**

PNM's Application contains all information required by 17.9.592.10 NMAC. *See* Campbell Direct at 4-5. Additionally, PNM has shown by a preponderance of the evidence that the Proposed BB2 Project would not unduly impair important environmental benefits. Accordingly, PNM's request for location approval should be granted.

## **VI. PNM'S REQUEST FOR RIGHT-OF-WAY WIDTH DETERMINATION**

### **A. STATUTORY REQUIREMENTS**

Under Section 62-9-3.2 of the PUA, no person shall begin construction of a transmission line requiring a width for right-of-way greater than 100 feet without first obtaining from the Commission "a determination of the necessary right-of-way width to construct and maintain the transmission line." A utility requesting a ROW width determination must provide notice of the time and place of the hearing to any owner of property proposed to be taken and, if applicable, the person in actual occupancy of the property. *Id.*, § 62-9-3.2(D) (2001).

On September 18, 2018, PNM filed the Affidavit of Brian Buffington, PNM's Project Manager, Regulatory. Mr. Buffington attested that on September 5, 2018, PNM mailed notice of the time and place of hearing to all landowners and persons in actual occupancy of all lands crossed by the BB2 Project that were known to PNM at that time. He further attested that after September 6, 2018, PNM became aware of additional persons in actual occupancy of lands crossed by the BB2 Project and mailed notice to them on September 14, 2018. He said that if

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of appellant's witness, who was allegedly better qualified). In assessing credibility, the trier of fact may consider a witness's interest in the case. UJI 13-2003 NMRA ("Jury sole judges of witnesses") (in determining credit to be given to the testimony of any witness, jury may take into account any interest that the witness may have).

PNM became aware of additional persons in actual occupancy of lands crossed by the BB2 Project, it would serve notice on them and file additional affidavits.

## **B. PNM'S EVIDENCE IN SUPPORT OF ITS REQUEST FOR A RIGHT-OF-WAY DETERMINATION**

PNM asks the Commission to determine that a maximum 150 foot right-of-way width is necessary. If the BB2 Project is approved and PNM finds that more than 150 feet is necessary, PNM will seek Commission approval of the greater width. Tr. 1-16-19 at 48-49 (Mechenbier).

The BB2 Project would consist of about 45 miles of utility corridor within a 150-foot wide right-of-way and 40-acre switching station. In total, about 812 acres would be part of the right-of-way. Exh. DC-5 at 26, to Campbell Direct. The 150-foot right-of-way would span 75 feet on each side of the center line. Campbell Direct at 16-17. The BB2 Project would generally parallel the existing BB Line with about 150 feet of separation between the two lines, requiring an additional 150 foot right-of-way. Exh. DC-7 at 25, to Campbell Direct.

The BB2 Project would be built using about 175 structures placed next to existing BB Line structures.<sup>10</sup> Structure heights would range from 120 to 150 feet varying with terrain and span lengths. Each typical H-frame pole would be installed by directly embedding the poles 15 to 30 feet deep. Each structure site would be about 20 feet by 40 feet. Exh. DC-5 at 20, to Campbell Direct; Tr. 2-4-19 at 234 (Johnson).

Span lengths would typically be spaced about 1,000 to 1,500 feet apart, resulting in about 4 to 5 structures per mile of line. However, in rugged terrain, structure placement may require longer spans. The actual right-of-way widths throughout the length of the BB2 Line, which at all times would be a minimum of 150 feet, would be finalized based on the engineering requirements that dictate the location of the structures along the Line's route. Campbell Direct at 16-18. Because final engineering specifications and local site conditions and terrain could

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<sup>10</sup> A structure is a steel or wood pole or lattice-steel support for line conductors. Exh. DC-7 at 34, to Campbell Direct.

require a right-of-way width greater than 150 feet, “PNM does not know precisely a maximum width that could be required in the rare event a 150 foot width must be exceeded.” Mechenbier 10-17-18 Supp. at 4. Mr. Mechenbier said that the maximum span length that PNM would use in connection with a 150-foot right-of-way would be 1760 feet. Tr. 1-16-19 at 47-48.

Mr. Campbell said that a 150-foot right of way is required to comply with Section 234 of the National Electrical Safety Code (NESC), which has been adopted by the State of New Mexico. The NESC contains requirements for the design, construction, maintenance and operation of electric supply and communication lines, equipment and supply stations to safeguard persons from hazards associated with those activities. Exh. DC-7 at 32, to Campbell Direct. The NESC requires minimum horizontal and vertical clearances for overhead lines, which vary depending on voltage. Campbell Direct at 17. The clearance requirement under the NESC is used as the minimum right-of-way width. Factors that influence the clearance requirement or right-of-way width include the type of support structures used, span length, conductor size and type, the number of circuits, wind speed and conductor blowout (the distance the wires are moved by a crosswind). Sidler Direct at 16.

David Evans and Associates performed an analysis to determine for PNM the minimum right-of-way width required under the NESC for two proposed structure types: the DBD-1901 and the DBD-603. Exh. JRM-1 Rebuttal at 1, to Mechenbier Rebuttal. The DBD-1901 is described as “single-circuit, H-frame, self-weathering or galvanized tubular steel, vertical conductor bundle.” The DBD-603 is described as “double-circuit, galvanized or self-weathering tubular steel, vertical conductor bundle.” *Id.* at 3. The DBD-603 is available only for a short distance on the western edge of the Proposed Project area. Exh. DC-7 at 24, to Campbell Direct.

Evans and Associates applied Section 234 of the NESC, which specifies horizontal clearance requirements for two conditions: (1) the conductor without wind displacement (at rest); and (2) the conductor with wind displacement. The conductor is the wire cable strung between transmission towers. Exh. DC-7 at 30, to Campbell Direct. Wind displacement is the

adjusted position of a conductor as a result of wind blowing the conductor. “Blowout” is the magnitude of the horizontal displacement of a conductor due to wind. Exh. DC-7 at 30, to Campbell Direct.

For each of the DBD-1901 and the DBD-603 structures, Evans and Associates calculated the minimum right-of-way for various span lengths and, for each span length, for load cases under a variety of wind and weather scenarios. The two weather case descriptions that Evans and Associates emphasized, and which produced the greatest right-of-way width requirements, are the “blowout” and “extreme wind” scenarios. The greatest right-of-way widths resulted from the longest span lengths under an extreme wind scenario. *See* Exh. JRM-1 Rebuttal at 6-7, to Mechernbier Rebuttal. Evans and Associates’ Report says that while there are no required clearances under NESC for an extreme wind event (although there is a strength requirement), “[t]ypically an extreme wind case is considered as part of risk management for reliability concerns” and “often energy providers will examine clearances for an extreme wind event[.]” *Id.* at 1, 4.

The results of Evans and Associates’ analysis show that, for a DBD-1901 structure, the minimum right-of-way widths for a blowout scenario and an extreme wind scenario, assuming a span length of 1400 feet, are 121.5 feet and 143.6 feet, respectively. The minimum right-of-way width for an extreme wind scenario and assuming a span length of 1445, is 149.7. If the span length is increased to 1600 feet, the minimum right-of-way widths for a blowout scenario and an extreme wind scenario are 135.8 feet and 170.1 feet, respectively. If the span length is increased to 1800 feet, the minimum right-of-way widths for a blowout scenario and an extreme wind scenario are 152.7 feet and 202.8 feet, respectively. *Id.* at 6-7.

The results of Evans and Associates’ analysis show that, for a DBD-603 structure, the minimum right-of-way widths for a blowout scenario and an extreme wind scenario, assuming a span length of 1100 feet, are 78 feet and 92 feet, respectively. The minimum right-of-way width for an extreme wind scenario and assuming a span length of 1525 feet, is 149.7 feet. *Id.*

## **C. STAFF'S POSITION ON PNM'S REQUEST FOR RIGHT-OF-WAY DETERMINATION**

In his initial Direct Testimony, Staff witness Jack Sidler recommended that the Commission reject PNM's request for a determination that a *minimum* 150 foot width is necessary, for two reasons. First, Mr. Sidler said that PNM's evidence was deficient because PNM had not provided calculations and drawings with each page wet-stamped by a New Mexico licensed Professional Engineer. Sidler Direct at 17-21. Second, Mr. Sidler said that the Commission should never approve a request for determination of a *minimum* right-of-way width "because this gives the requesting party an unlimited ROW width without having to return to the Commission." Mr. Sidler said that the Commission should make determinations of the *maximum* right-of-way width. *Id.* at 21-22.

In response to Mr. Sidler's recommendations, PNM, as part of Mr. Mechenbier's Rebuttal Testimony, submitted right-of-way width calculations with each page wet-stamped by a New Mexico licensed Professional Engineer. *See* Exh. JRM-1 Rebuttal, to Mechenbier Rebuttal. Additionally, while Mr. Mechenbier noted that the Commission has determined *minimum* right-of-way widths under Section 62-9-3.2, he said that "PNM has confirmed that a maximum 150 feet ROW width is adequate for the entire line and provided a New Mexico professional engineer stamp to support the calculations." Mechenbier Rebuttal at 4 (emphasis in original). Mr. Mechenbier said that PNM agrees with Mr. Sidler's recommendation that the requested right-of-way width should be expressed as a maximum width in this case. Tr. 1-16-19 at 48.

In Supplemental Testimony in response to Mr. Mechenbier's Rebuttal Testimony, Mr. Sidler acknowledged that the Commission had determined *minimum* right-of-way widths in two cases and said that "[t]he implications of Commission approval of minimum ROW widths did not occur to Staff until this case." Sidler 1-9-19 Supp. at 5. He said, "Staff appreciates PNM's willingness to accept a maximum ROW width of 150 ft. in this case." *Id.* In light of PNM's agreement to accept a determination of a maximum right-of-way width and its submission of

stamped calculations by a New Mexico licensed Professional Engineer, Mr. Sidler said that Staff's new position was that the Commission should approve PNM's request for a maximum 150 foot right-of-way width for the BB2 Line. *Id.* at 6.

## **D. BILL KING RANCH'S POSITION ON PNM'S REQUEST FOR RIGHT-OF-WAY DETERMINATION**

BKR argues that PNM has not met its burden of proving that a 150 foot right-of-way width would safety support the BB2 Line. BKR's Initial Posthearing Brief at 15. BKR is correct, as discussed in *infra* Section VI(E).

## **E. HEARING EXAMINER'S RECOMMENDATION ON PNM'S REQUEST**

Evans and Associates concluded:

It was found that 150 feet is the recommended minimum right-of-way width to accommodate the conductor displacement caused by wind (blowout) under the National Electrical Safety Code (NESC) Rule 250C Extreme Wind Load Case with a suitable margin for construction and other tolerances.

Exh. JRM-1 Rebuttal at 1, to Mechenbier Rebuttal. However, as shown in *supra* Section VI(B), this conclusion only applies, for a DBD-1901 structure, if the span length is no more than 1445 feet, because at a span length of 1600 feet, the minimum right-of-way is 170.1 feet in an extreme wind condition. *Id.* at 7.

The following questions and answers of Mr. Mechenbier show that PNM's intent is to comply with the clearance requirement for a blowout weather condition, not an extreme wind condition:

**Question:** And what was the conclusion of David Evans and Associates as to whether or not a right-of-way width of 150 feet was a safe right-of-way width?

....

**Answer:** If you go to page 7 of 12, Table 3, the calculation using what's [the] approved National Electric Safety Code for the blowout, looking at the structure DBD-1901, it's the

first one in that table of a ruling span. And what a ruling span means [is] between structure to structure of 1760 [feet], based on the calculation, the minimum right-of-way would be 149.4. (Emphasis added).

....

**Question:** [W]hat is the maximum ruling span that PNM would use in connection with the requested 150-foot right-of-way?

**Answer:** The National Electric Safety Code *per the blowout* for the structure DBD-1901 is 1760. (Emphasis added)

....

**Question:** What right-of-way do you believe would be safe?

**Answer:** Per the calculations, 150 feet.

Tr. 1-16-19 at 39, 42, 47-48.

PNM submitted no evidence explaining why it should only comply with the clearance requirement for a blowout condition and not an extreme wind condition. Evans and Associates' report indicates that it is prudent to comply with the clearance requirement for an extreme wind condition. *Supra* § VI(B). In three recent cases, this Commission determined that 180 and 200 foot right-of-way widths were necessary to meet clearance requirements under an extreme wind scenario.<sup>11</sup> To comply with an extreme wind condition, a 1760 ruling span for a DBD-1901 structure requires a minimum right-of-way width close to 202.8 feet. Exh. JRM-1 Rebuttal at 7, Table 2, to Mechamier Rebuttal (minimum right-of-way for DBD-1901 structure under extreme wind condition and 1800 foot ruling span). Therefore, it should be determined that the maximum right-of-way width to construct and maintain the BB2 Line is 200 feet. This does not mean that PNM is required to obtain a 200 foot right-of-way width for the entire BB2 Line; it

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<sup>11</sup> Case No. 18-00065-UT, Recommended Decision at 71, 75 (10-3-18), adopted by Final Order Adopting Recommended Decision as Modified by Supplemental Recommended Decision and Errata to Recommended Decision (10-3-18); Case No. 17-00275-UT, Certification of Stipulation at 55, 113 (4-13-18), adopted by Final Order Adopting Certification of Stipulation (5-2-18); Case No. 17-00040-UT, Certification of Stipulation at 31 (8-7-17), adopted by Final Order Approving Stipulation (8-30-17).

means that PNM must comply with the clearance requirements for an extreme wind condition for all sections of the Line.

## **VII. PNM'S REQUEST FOR RATEMAKING TREATMENT**

### **A. STATUTORY AUTHORITY FOR REQUEST**

Section 62-9-1(B) states in part:

If a certificate of public convenience and necessity is required pursuant to this section for the construction or extension of a generating plant or transmission lines and associated facilities, a public utility may include in the application for the certificate a request that the commission determine the ratemaking principles and treatment that will be applicable for the facilities that are the subject of the application for the certificate. If such a request is made, the commission shall, in the order granting the certificate, set forth the ratemaking principles and treatment that will be applicable to the public utility's stake in the certified facilities in all ratemaking proceedings on and after such time as the facilities are placed in service. The commission shall use the ratemaking principles and treatment specified in the order in all proceedings in which the cost of the public utility's stake in the certified facilities is considered.

### **B. TERMS OF SPECIAL SERVICE CONTRACT WITH FACEBOOK, RATE 36(B) AND RATE RIDER NOS. 47 AND 49**

In Case No. 16-00191-UT, the Commission approved a Special Service Contract (SSC) between PNM and Facebook, Inc. Comm'n Exh. 1. Effective December 5, 2017, Facebook assigned its interest in the SSC to its wholly-owned subsidiary, Greater Kudu LLC. The current version of the SSC is the Second Amended and Restated SSC between PNM and Greater Kudu LLC, which the Commission approved in Case No. 18-00269-UT. Comm'n Exh. 5. This Recommended Decision refers to Facebook and Greater Kudu as "Facebook."

Under the SSC, monthly charges for electric service to Facebook are set forth in three PNM rates or rate riders:

1. PNM Rider No. 47, Green Energy Rider
2. PNM Rate No. 36B, Special Service Rate-Renewable Energy Resources

3. PNM Rider No. 49.

Comm'n Exh. 5, § 5.

Under Rider No. 47, if PNM acquires renewable resources for Facebook under a PPA, Facebook "shall pay PNM the full cost of the PPA in periodic, typically monthly, payments that coincide with PNM's payment obligation under the PPA." Comm'n Exh. 3, under "Rate Methodology."

Under Rate No. 36B, the Special Service Rate (SSR), Facebook pays the following charges to PNM:

1. A customer charge
2. A transmission demand charge
3. An energy charge for system supplied energy
4. An energy-related non-fuel charge for system supplied energy
5. A contribution to production component

Comm'n Exh. 2. The first four listed charges above recover "Customer's allocated share of customer costs, transmission costs, System Supplied Energy costs, and energy-related non-fuel costs." These charges are subject to adjustment in PNM general rate cases. Comm'n Exh. 5, § 5.2.1.1. The contribution to production component was originally fixed for ten years beginning on the commercial operation date of the Data Center but this was changed in the Second Amended and Restated SSC to be reset in PNM's next general rate case as a demand-based charge. Case No. 18-00269-UT, Final Order, ¶ 46.

Under Rider No. 49, Facebook pays the amount of any under-collection resulting from the reconciliation of production cost allocations. Comm'n Exh. 4.

Section 3.3 of the SSC states:

Electric Facilities. Transmission system upgrades will be required to provide electric service to meet Customer load, the costs of which shall be recovered by PNM through direct reimbursement by Customer under a separate Electric Facilities Agreement between Customer and PNM. Other transmission facility upgrades to PNM's transmission system that may be required to serve

additional Customer load, and associated costs, shall be addressed in separate electric facilities agreements between PNM and Customer.

PNM's 3<sup>rd</sup> Revised Rate No. 36B states in part:

**EXPLANATION OF RATE:** . . . If the electric service requested by the customer requires the Company to extend or upgrade its transmission or other facilities, the cost of the extension or upgrade shall be paid by the customer to the extent consistent with generally accepted regulatory principles of cost causation, and shall be included in the rates set in the Special Service Contract, with adequate provisions to secure the customer's payment obligation.

....

**SUBSTATION EQUIPMENT:** All substation and distribution transformers, the necessary structures, voltage regulating devices, lightning arrestors, and accessory equipment required by the customer in order to utilize the Company's service at 115 kV or higher voltage shall be installed, paid for, owned, operated, and maintained by the customer.

In Case No. 16-00191-UT, the Commission approved three PPAs between PNM and PNMR Development and Management Corporation for PNM to procure a total of 30 MW of solar capacity and energy (the Initial Solar Facilities PPAs) "as the initial step in complying with the SSC's requirement that PNM acquire sufficient renewable resources to match the electric service needs of Customer as its needs expand over time." Case No. 18-00009-UT, Final Order at 10, ¶ 30. The only incremental capital cost incurred by PNM associated with serving Facebook at that time was for the extension of PNM's 115 kV system necessary to serve the Data Center site. As provided in the SSC, Facebook paid the full cost for this extension up-front. The Commission stated:

[T]he addition of this new load to PNM's system will not result in any additional transmission system costs to any of PNM's other customers. PNM states that separate facilities agreements will be entered into as necessary for the delivery of Additional Renewable Energy Procurements.

Case No. 16-00191-UT, Final Order at 18, ¶ 46 (citation omitted).

In Case No. 18-00009-UT, the Commission approved three more PNM PPAs "to provide service to Customer [Facebook Inc. subsidiary Greater Kudu LLC] pursuant to the terms, conditions and cost recovery provisions of the SSC, Rate No. 36B and Rider No. 47[.]" Case No. 18-00009-UT, Final Order at 8, ¶ 24. The proposed PPAs were with (1) Casa Mesa Wind, LLC

for 50 MW of capacity and wind energy and one MW of battery storage; (2) Avangrid Renewables, LLC for 166 MW of capacity and wind energy, referred to as the “La Joya PPA”; and (3) Route 66 Solar Energy Center, LLC for 40 MW of capacity and solar energy. *Id.* at 7-8, ¶ 22.

In Case No. 18-00269-UT, the Commission approved two more PNM PPAs totaling 100 MW of solar generation pursuant to the SSC. The Commission said, “The energy and capacity provided by the two PPAs are necessary to meet the Customer’s electric service requirements at its Data Center.” Case No. 18-00269-UT, Final Order, ¶ 24(b) (10-17-18).

## C. PNM’S EVIDENCE IN SUPPORT OF REQUEST

PNM requests that the Commission determine the ratemaking principles and treatment that would apply to the BB2 Project in all future ratemaking proceedings. More specifically, PNM requests:

1. That the Commission include, in its Order, the “certificated estimated cost” for the Proposed BB2 Project pursuant to 17.3.580 NMAC (“Rule 580”);<sup>12</sup>
2. To include the actual cost of the BB2 Project, estimated to be \$85 million (including estimated AFUDC of \$3.5 million), in PNM’s rate base; and
3. To recover the reasonable actual operation and maintenance costs, property taxes and depreciation expenses of the BB2 Project.

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<sup>12</sup> Rule 580.11 states that no utility shall obtain rate recovery of any cost overrun in the construction of electric generating plant until the Commission determines, upon notice and hearing, whether those costs have been incurred prudently. “Cost overrun” means — in instances where an allowance for contingencies was included by the utility in the certificated estimated cost — that portion of the costs of construction which exceeds the certificated estimated cost by any amount. 17.3.580.7(D) NMAC. “Cost overrun” means — in instances where no allowance for contingencies was included in the certificated estimated cost — that portion of the costs of construction which exceeds the certificated estimated cost by 10% or more. *Id.* “Certificated estimated cost” means the total cost of construction of electric generating plant for the utility, including allowances for funds used during construction, as estimated by the utility at the time of issuance by the Commission of a CCN for the plant and reflected in the order issuing the CCN. 17.3.580.7(A) NMAC.

The purpose of Rule 580 is to clarify and implement the Public Utility Act by providing that no cost overruns incurred in construction of new electric generating plant will be included in rates unless the Commission determines whether they were prudently incurred. 17.3.580.6(A) NMAC. Nothing in Rule 580 binds the Commission to any particular ratemaking methodology or diminishes the Commission’s authority to review the prudence of all costs incurred by a utility, including the certificated estimated cost of plant. 17.3.580.13 NMAC.

4. To recover, through its retail revenue requirement in its next general rate case, the revenue requirement of the BB2 Project allocated to the retail jurisdiction.

Alcantar Direct at 2, 8; Tr. 2-4-19 at 171 (Alcantar); PNM's Initial Posthearing Brief at 10 ("PNM seeks to include the costs of this Project in its next rate case insofar as those costs are allocated to its retail customers").

Under PNM's proposed ratemaking treatment, the Commission would determine in PNM's next general rate case the actual cost of the BB2 Project. If the actual cost is less than the estimated cost, PNM would seek to recover only the actual cost. If the actual cost is more than the estimated cost, the Commission would determine if the additional costs are prudent. Under PNM's proposal, the Commission would examine the used and usefulness of the Proposed BB2 Project in its next general rate case only if there has been a material change in circumstances. Tr. 2-4-19 at 235-36 (Mechenbier).

The total estimated revenue requirement of the BB2 Project (wholesale/FERC and retail) is \$10,446,619. The estimated amount that PNM would seek to recover from its New Mexico retail customers is \$5,371,282, which is 51.16% of \$10,446,619. Exh. KCA-2 to Alcantar Direct.

PNM allocated the total estimated cost of the BB2 Project between its retail and FERC/wholesale jurisdictions based on each jurisdiction's contribution to the 12-monthly coincident peak (CP) demand on the transmission system, which is the same method that PNM used to allocate transmission system costs in its most recent New Mexico base rate case — Case No. 16-00276-UT. Alcantar Direct at 4. The CP Method in general divides costs among jurisdictions in proportion to the peak demands imposed by the jurisdictions at the time of the system peak. The 12-CP Method in particular identifies each month's system peak and defines the system peak as the average of the monthly system peaks. Tr. 2-4-19 at 177 (Alcantar).

In Case No. 16-00276-UT, PNM allocated 51.82% of transmission system costs to its retail jurisdiction. PNM expects that approval of its request for ratemaking treatment would decrease the percentage allocation of transmission costs to its retail jurisdiction to 51.16%

because adding the BB2 Project would reduce the allocation of total transmission costs to PNM retail customers and increase the total allocation to FERC/wholesale customers. This is because adding the BB2 Project would increase the 12-CP demand of the wholesale jurisdiction. Tr. 2-4-19 at 177 (Alcantar).

PNM anticipates that recovery of the estimated \$5,371,282 retail revenue requirement from PNM retail customers would not result in an incremental cost increase to these customers because of the expected reduction in total transmission costs allocated to the retail jurisdiction if the BB2 Project is approved and increased transmission revenues from Facebook because of the Data Center's increased energy use. Alcantar Direct at 5. In Case No. 18-00009-UT, PNM witness Henry Monroy said that approval of the BB2 Project would result in a reduction of total transmission costs allocated to the retail jurisdiction by \$8.6 million on a net present value basis based on a 38-year life of the BB2 Project.

PNM argues that because neither Staff nor Intervenors asserted nor presented any evidence that Facebook should be required to directly reimburse PNM for costs of the BB2 Project, "there is no factual support in the record for such a result." PNM's Initial Posthearing Brief at 27. Underlying PNM's assertion is the oft-repeated, but unsupported, argument that a presiding officer cannot develop a record necessary for the Commission to make a decision in the public interest. This argument has been consistently rejected by the Commission. *See, e.g.,* Case No. 15-00261-UT, Order Reopening Proceeding, ¶ 13 (5-18-16) ("The Commission has broad plenary authority to inquire into matters within its jurisdiction and is not only entitled, but obligated, to exercise that authority to ensure that a sufficient factual record is developed to support its decision on all of the issues presented by an application.").

## **D. PARTIES' POSITIONS ON PNM'S REQUEST**

BKR opposes PNM's request for ratemaking treatment, arguing that it is inconsistent with principles of cost causation and used and usefulness. BKR's Posthearing Response Brief at 3, 6.

Staff recommends that the Commission authorize PNM to include the Proposed BB2 Project in rate base in its next general rate case in an amount up to \$85 million, subject to adjustment upon a true up, less depreciation and amortization. Sidler Direct at 4. Staff agrees with PNM that unless there is a material change in circumstances between this case and the next general rate case in which PNM seeks recovery of the costs of the BB2 Project, the need and usefulness of the BB2 Project should not be subject to relitigation. Sidler 1-9-19 Supp. at 4.

## **E. HEARING EXAMINER'S RECOMMENDATION ON PNM'S REQUEST**

PNM's request for ratemaking treatment should be denied because approving it would preclude the Commission from enforcing the SSC and ordering that Facebook shall directly reimburse PNM for costs of the Proposed BB2 Project.

In its Initial Posthearing Brief, PNM argues that its request for ratemaking treatment is unrelated to whether Facebook should be allocated costs of the BB2 Project. PNM's Initial Posthearing Brief at 25. However, PNM witness Alcantar testified at the hearing that approval of PNM's requested ratemaking treatment would not leave open the possibility of the Commission allocating part of the BB2 Project cost directly to Facebook. Tr. 2-4-19 at 171. This is consistent with her testimony that PNM seeks authority to recover from retail ratepayers in its next general rate case the estimated \$5.37 million retail revenue requirement of the BB2 Project. *Id.* If Facebook were ordered to directly reimburse PNM for costs of the BB2 Project pursuant to principles of cost causation, no portion of the revenue requirement of the Project would be recoverable from other retail ratepayers.

PNM’s primary argument against requiring Facebook to directly reimburse PNM for costs of the Proposed BB2 Project is that the Project would be a network upgrade that would benefit all retail customers and, therefore, all retail customers should share in its cost. For example, PNM witness Mechenbier said that the Proposed Project is “a system improvement to the overall transmission grid, and it’s going to be used to serve retail customers and FERC wholesale customers.” Tr. 2-4-19 at 236. He later added that because the output of the La Joya wind facility will serve all PNM customers, the BB2 Project would be a system improvement. *Id.* at 245. He emphasized that “the physical output of La Joya” will serve all retail customers because energy travelling over the BB2 Line would not only serve Facebook. *Id.* at 246-47, 254 (Mechenbier).

Mr. Mechenbier further said that the Proposed BB2 Project “directly benefits all retail customers because it will transmit power acquired for retail customers, including meeting a portion of the projected demand of the Data Center Customer, under Commission-authorized system resource PPAs.” Mechenbier Direct at 23. Other alleged benefits of the Proposed BB2 Project are that it would provide opportunities to transmit power for off-system sales and provide enhanced system reliability and redundancy from the Clines Corners Switching Station west to the BA Switching Station by adding interconnection and delivery points to the existing network. Mechenbier Direct at 23.

Traditionally, a public utility does build its system to serve the needs of its entire service territory and adds plant to contribute to the efficient and adequate operation of its whole system and serve system load. Typically, ratepayers served by an interconnected utility system all bear the costs of that system. When the Commission sets revenue requirements and designs rates, it does so on the basis of total utility system. Case No. 15-00185-UT, Recommended Decision at 13 (9-30-15), adopted in relevant part by Final Order Adopting Recommended Decision with Modification (10-7-15).

Conversely, public utilities traditionally have not built plant to serve a single customer because, in general, a customer should not be allowed to pick and choose the type of energy generation that serves it. This is because doing so could result, for example, in a public utility building generation plant with a low cost fuel source for a large business customer, and the large business customer leaving the utility's system to receive service at a lower cost than the utility's other customers, possibly resulting in unlawful discrimination. *Id.* at 13-14.

Additionally, if a public utility builds new plant for an existing customer, costs are at risk of becoming stranded as a result of the customer leaving the utility's system. A stranded cost is the portion of any prudent investment, deferred cost or commitment not yet paid for by a customer choosing to leave a utility's system, which was made to serve that customer during a period when regulatory statutes imposed a requirement to serve it at a regulated price. A customer leaving the system will not inevitably cause an increase in rates to other customers, but the potential exists that captive customers remaining on the system will be unduly burdened with fixed costs, including the cost of generation plant no longer needed. *Id.* at 14.

In Case No. 15-00185-UT, the Commission recognized that these two situations — allowing customers to choose their energy source and creating the risk of strandable costs — have materialized through the increasing role of renewable energy in electric power generation. *Id.* at 14. In that case, the Commission granted a CCN to El Paso Electric Company (EPE) for a solar generating facility on land wholly within Holloman Air Force Base (HAFB). The energy from the facility was to be an EPE-owned resource dedicated to serve HAFB. Pursuant to a contract between EPE and HAFB, EPE was to recover all project costs from HAFB. The Commission recognized that EPE's Application was unlike traditional applications for CCNs in that EPE sought to build plant dedicated to a single customer's use. However, under the unique circumstances of the case, the Commission found that issuance of a CCN was in the public convenience and necessity because it helped HAFB to meet its renewable energy goals. *Id.* at 17. The Commission ordered that EPE's ratepayers shall be held harmless for the costs of the

project if HAFB ceased to receive service from EPE before paying the costs of the project. *Id.* at 21.

This case, and other Commission cases involving service to Facebook, are like Case No. 15-00185-UT in that PNM, through the SSC, committed to serve Facebook, theoretically at least, with only renewable energy: PNM allowed Facebook to pick the type of energy generation that serves it. PNM acknowledged the uniqueness of this arrangement in Case No. 16-00191-UT, in which it stated that because it was proposing the Initial Solar Facilities PPAs to match “the special renewable energy service requirements of a particular potential new customer” — Facebook — it was not seeking to recover the costs of the PPAs from its general body of customers. Instead, pursuant to Rider No. 47, “all costs associated with the Initial Solar Facilities PPAs will be directly assigned to Facebook[.]” PNM stated that the proposed Initial Solar Facilities PPAs were not “a typical resource for PNM to add to its supply portfolio in that PNM typically adds resources, including renewable energy resources, to its supply portfolio as ‘system resources’ based on its determination that they are necessary for PNM to provide reliable, cost-effective service to all of its customers, rather than to match a particular customer’s service needs[.]” PNM testified that any additional renewable energy procurements by PNM pursuant to the SSC and Rider No. 47 “would be of a similar nature.” Case No. 16-00191-UT, Final Order at 24, ¶ 56.

PNM’s emphasis on the Proposed BB Project being a “network upgrade” is unpersuasive because any transmission upgrade will add reliability and redundancy to the system. PNM’s emphasis that the La Joya energy would serve all PNM retail customers because, once electrons enter PNM’s system, they cannot be traced, while true, is unpersuasive. What PNM ignores is that, in the words of its own witness, 166 MW of capacity from the Proposed BB2 Project would be “dedicated” to Facebook’s contractual entitlement to be served, at least in theory, by renewable energy.

PNM's assertion that the BB2 Project "is needed and proposed as an upgrade to PNM's overall transmission system," PNM's Initial Posthearing Brief at 29, is contradicted by the evidence. PNM is proposing the BB2 Project to serve two customers. One of those two customers is Facebook, a single PNM retail customer. The other customer is Avangrid, who is a PNM point-to-point transmission customer, not a PNM retail customer. Tr. 1-16-19 at 33 (Mechenbier). The 362 MW of capacity is not needed to meet PNM's peak demand: it is only necessary, in part, to serve Facebook. *Id.* at 99 (Mechenbier). The only reason that PNM is pursuing the BB2 Project "is because of the transmission commitments that have been made on it." *Id.* at 113-14 (Mechenbier). PNM would have not have pursued the BB2 Line solely to enhance the reliability of its system and provide backup for the BB Line. *Id.* at 114. There are no plans for the BB2 Line to be used to serve PNM retail customers other than Facebook. *Id.* at 100 (Mechenbier).

PNM's argument that the BB2 Project is a system resource conflicts with PNM witness Mechenbier's testimony on the first day of the hearing that:

Example 1 (Tr. 1-16-19 at 24):

**Question:** I saw percentages referred to in the testimony of PNM that only about 50 percent of the power that's going to be transmitted by this line will go to New Mexico retail customers, correct? In fact, that's one customer, correct?"

**Answer:** At this time we only know of the one customer.

Example 2 (Tr. 1-16-19 at 31):

**Question:** So, Mr. Mechenbier, I want to make sure I understand this. You have one – for this particular line, there's one retail customer, and that's Facebook, correct?

**Answer:** The data center in Los Lunas, yes, Facebook.

Example 3 (Tr. 1-16-19 at 33):

**Question:** [T]here was testimony in this case by PNM that approximately 50% of the power that's being transmitted is going to the data center, Facebook, and approximately

50%, and I don't recall the exact percentages, it's within 1 or 2, was being sold otherwise.

Is that right?

**Answer:** To be exact, 196 [MW] of it is a point-to-point transmission from Clines Corner to Four Corners. That's the point to point. *And then 166 megawatts would be serving the data center.* (Emphasis added).

Example 4 (Tr. 1-16-19 at 59):

**Question:** As we sit here today, how much capacity have they [Avangrid] requested on the BB2 Line?

**Answer:** They've requested a total of 362 megawatts, *but 166 megawatts of that would be reallocated to the Data Center.* (Emphasis added).

Example 5 (Tr. 1-16-19 at 98):

**Question:** And has PNM granted firm transmission capacity to Avangrid for the 166 megawatts that would serve Facebook?

**Answer:** They have signed [a] transmission service agreement for firm transmission for 166 megawatts *that will be converted once the line is in service to serve Facebook.* (Emphasis added).

**Question:** *So is that capacity, can we say it's been dedicated to serving Facebook?* (Emphasis added).

**Answer:** *Correct.* (Emphasis added).

**Question:** And so has the remaining 196 megawatts been dedicated or has firm transmission been granted by PNM to anyone?

**Answer:** That is correct. To Avangrid.

Example 6 (Tr. 1-16-19 at 99):

**Question:** Is the transmission capacity, the 362 megawatts from the Proposed Project, is that capacity required to meet PNM's peak load?

....

**Answer:** No, it's not needed. *It's needed to serve – a portion of that is needed to serve the Data Center.* (Emphasis added).

Example 7 (Tr. 1-16-19 at 100):

**Question:** So currently there are no plans for the Proposed Line to be used to serve PNM retail customers other than Facebook?

**Answer:** That is correct.

Example 8 (Tr. 1-16-19 at 103):

**Question:** Currently are there any plans to use the Proposed Line to serve PNM retail customers other than Facebook?

**Answer:** At this time I'm not aware of the use of the transmission facility beyond Facebook.

In Case No. 16-00191-UT, in which the Commission approved the SSC between PNM and Facebook, PNM witnesses said “*that Facebook does not wish, and has not requested, that the cost of the electric service for its data center be subsidized by any other customers.*” Case No. 16-00191-UT, Final Order at 11, ¶30 (emphasis added).

Section 3.3 of the SSC ensures that other retail customers do not subsidize the cost of transmission system upgrades necessary to meet Facebook’s increased load by requiring Facebook to directly reimburse PNM for “transmission system upgrades” required to serve Facebook’s load. The Final Order in Case No. 16-00191-UT states in part:

PNM states that the only incremental capital cost incurred by PNM associated with serving Customer’s data center will be for the extension of PNM’s 115 kV system necessary to serve the data center site. *As provided in the Contract, Facebook has elected to pay the full cost for this extension up-front. Thus, according to PNM, the addition of this new load to PNM’s system will not result in any additional transmission system costs to any of PNM’s other customers.* PNM states that separate facilities agreements will be entered into as necessary for the delivery of Additional Renewable Energy Procurements.

*Id.* at 18, ¶46 (emphasis added).

The SSC was approved by the Commission upon PNM's request in Case No. 16-00191-UT. "Any agreement that must be filed and approved by an agency loses its status as a strictly private contract and takes on a public interest gloss. That means that when the agency reconciles ambiguity in such a contract it is expected to do so by drawing upon its view of the public interest." *Cajun Elec. Power Coop., Inc. v. F.E.R.C.*, 924 F.2d 1132, 1135 (D.C. Cir. 1991). As such, upon approval by the Commission, the SSC became an order of the Commission, and the Commission may use all of its available authority to enforce that order. Case No. 04-00237-UT, Final Order at 29 (4-14-05).

PNM did not ask Facebook to pay for costs of the BB2 Project up front pursuant to Section 3.3 of the SSC. Tr. 1-16-19 at 101 (Mechenbier). PNM has not entered into a separate electric facilities agreement with Facebook under Section 3.3 of the SSC. When asked why not, Mr. Mechenbier said that "[t]he BB2 Project is a system improvement for the overall transmission system to move resources to retail customers such as Facebook" and that the energy from the La Joya wind project will be delivered to all PNM customers. *Id.* at 250-52.

PNM tried to reconcile Facebook's up-front payment in Case No. 16-00191-UT of 115 kV line extension costs necessary to serve Facebook with Facebook's nonpayment of any costs of the BB2 Project upfront: Mr. Mechenbier said:

Those were facilities required to serve the Data Center. Very specific, 115 line extensions that the customer paid those costs up front rather than have a minimum demand rate. The BB2 Project is different. It's a system improvement to an overall transmission grid that will serve both retail and FERC transmission customers.

*Id.* at 237. He explained that if Facebook had not paid that cost up front, it would have been charged a minimum demand rate. *Id.* PNM does not plan to add a demand rate to the SSC. *Id.* at 245 (Mechenbier).

Contrary to Mr. Mechenbier's testimony, the BB2 Project, like the 115 kv line extensions paid for by Facebook as part of Case No. 16-00191-UT, is required to serve Facebook. It is necessary to serve Facebook because expansion of the Facebook Data Center necessitated the La

Joya PPA, and the BB2 Project is necessary to move energy from the La Joya wind facility to PNM's system. PNM's Application in Case No. 18-00009-UT stated that PNM would recover from Facebook the costs of three PPAs, including the La Joya PPA, as provided in the SSC approved in Case No. 16-00191-UT. PNM's Application also stated that "the three PPAs are necessary because Customer is building out its Data Center and expanding its load as anticipated in the SSC." Case No. 18-00009-UT, Final Order at 1-2, ¶ 1. PNM witness Gerard Ortiz testified, and the Commission repeated, that expansion of the Data Center "necessitate[d] the three PPAs[.]" *Id.* at 12, ¶¶ 33, 70. All of the renewable energy certificates associated with energy provided under the three PPAs was to be solely dedicated to Facebook. *Id.* at 13, ¶ 34. PNM witness Jeff Mechenbier testified in Case No. 18-00009-UT "that to deliver power from the La Joya facility to PNM's system, PNM must construct 42 miles of 345 kV transmission line paralleling its existing 'BA-Clines Corner' transmission line." *Id.* at 18-19, ¶ 47. He also testified that PNM signed the La Joya PPA with Avangrid so that PNM will be serving Facebook through the BB2 Line. Tr. 1-16-19 at 102 (Mechenbier).

The Proposed BB Project, as described at pages 13 through 16, is a "transmission system upgrade" required to serve Facebook's increased load and subject to Section 3.3 of the SSC. See PNM's Initial Posthearing Brief at 27 ("[O]ne relevant and uncontested fact is that the proposed BB2 Project is a transmission system component[.]"). Therefore, Facebook is required to directly reimburse PNM for costs of the BB2 Project through a separate Electric Facilities Agreement. Contrary to Staff's circular argument, the lack of an existing Electric Facilities Agreement between PNM and Facebook does not mean Facebook is not required to directly reimburse PNM for costs of the BB2 Project. Staff's Initial Posthearing Brief at 27-28. It means that PNM and Facebook should be required to enter into an Electric Facilities Agreement pursuant to the Commission's authority to enforce the terms of the SSC.

PNM also argues that Facebook should not be required to directly reimburse PNM for costs of the BB2 Project because recovery of the costs of the Project through the normal

ratemaking process allegedly would not result in an incremental cost increase to PNM's other retail customers. PNM witness Alcantar relied on Henry Monroy's testimony in Case No. 18-0009-UT in which Mr. Monroy said that approval of the BB2 Project would result in a reduction of total transmission costs allocated to the retail jurisdiction by \$8.6 million on a net present value basis based on a 38-year life of the BB2 Project. Alcantar Direct at 5.

PNM relies on the following Recital and Definition in the SSC:

[Recital:] PNM and Customer intend that this Contract and all of the PNM tariffs described in this Contract will allow PNM to recover its reasonable costs of providing electric service to Customer for the Data Center in a manner that results in No Net Adverse Impact (as defined in this Contract) to any other PNM retail electric service customers.

....

[Definition:] "**No Net Adverse Impact**" means that, on balance, this Contract and the PNM tariffs described herein result in a neutral or positive impact on rates and service for PNM's other retail electric service customers considering all relevant benefits generated and burdens created by this Contract and those PNM tariffs.

Comm'n Exh. 5, Recitals, ¶ I; § 1 (Definitions). PNM's argument is unpersuasive for several reasons.

First, PNM's calculation that approval of the BB2 Project would reduce transmission costs allocated to the retail jurisdiction by \$8.6 million on a net present value (NPV) basis is flawed. To derive the \$8.6 million, PNM calculated the NPV of the difference between its transmission costs multiplied by 51.82% and its transmission costs multiplied by 51.16%. For example and hypothetically, if PNM's total transmission costs were \$100 million, PNM calculated the NPV of the difference between (\$100 million x 51.82%) and (\$100 million x 51.16%), or the NPV of \$660,000. Tr. 2-4-19 at 178-81 (Alcantar). PNM's calculation is faulty because its total transmission costs shouldn't be kept constant when determining savings from a reduction in the allocation percentage. Addition of the BB2 Project is what would cause the percentage allocation to the retail jurisdiction to decrease, so the difference should be between total transmission costs without the BB2 Project multiplied by 51.82% and total transmission

costs with the BB2 Project multiplied by the lower 51.16% allocation percentage. For example and again hypothetically, if PNM's total transmission costs without the BB2 Project are \$100 million and its total transmission costs with the BB2 Project are \$180 million, the correct method would be to calculate the NPV of the difference between (\$100 million x 51.82%) and (\$180 million x 51.16%), or the NPV of -\$40,268,000. In this hypothetical, there is no savings because decreasing the percentage allocation to the retail jurisdiction does not outweigh the increased cost allocated to the retail jurisdiction because of adding \$80 million in transmission costs. Tr. 2-4-19 at 179 (Alcantar).

Second, PNM's assertion that the cost of the BB2 Project would not result in an incremental cost increase to PNM's other retail customers is not convincing because the actual percentage allocations to the retail and wholesale jurisdictions will not be determined until PNM's next base rate case, and PNM is not committing to using a 51.16% retail allocation in its next general rate case. Alcantar Direct at 4-5, 7; Tr. 2-4-19 at 181 (Alcantar).

Third, PNM's reliance on the Commission's Final Order in Case No. 18-00009-UT is not persuasive. PNM relies on the following statement from that Final Order:

Mr. Monroy's Direct Testimony "demonstrates that on a net present value basis the additional transmission revenues Customer is expected to provide due to its increased load, and the reallocation of transmission costs from the retail jurisdiction to the wholesale jurisdiction will more than offset the revenue requirement of the interconnection and transmission investments needed to support the Route 66 and La Joya PPAs, so that PNM's other retail customers are currently projected to realize a net present value benefit in revenue requirements of \$21.4 million.

PNM's Initial Posthearing Brief at 28 (citing Case No. 18-00009-UT, Final Order at 26, ¶ 60). While this statement indicates that the Commission in that case found Mr. Monroy's testimony credible, the Commission in that case evidently did not probe Mr. Monroy's analysis in any depth. Also, the Commission in Case No. 18-00009-UT did not determine the ratemaking treatment of the Proposed BB2 Project. The Commission's only action in Case No. 18-00009-UT was to approve the PPAs. Case No. 18-00009-UT, Final Order at 34, ¶ B ("Because the three

proposed PPAs meet the requirements of Rule 551 and are consistent with the SSC approval in Case No. 16-00191-UT, they are in the public interest and are approved.”). Therefore, Paragraph 60 of the Final Order is *dictum* and not binding. *Kent Nowlin Constr. Co. v. Gutierrez*, 1982-NMSC-123, ¶ 8, 99 N.M. 389 (“Dictum is unnecessary to the holding of a case and therefore is not binding as a rule of law.”).

Fourth, PNM’s emphasis on “No Net Adverse Impact” to other retail customers is misplaced because, under the SSC, Facebook is required to pay for the cost of transmission improvements necessary to serve it regardless of whether there is no net adverse impact on other retail ratepayers from the cost of the improvement. If PNM’s proposed ratemaking treatment is adopted, Facebook would not pay any cost of the BB2 Project unless the Transmission Rate under the SSC is increased in PNM’s next general rate case: when asked whether Facebook would pay any of the estimated \$5.37 million revenue requirement of the Proposed BB2 Project, Ms. Alcantar said that Facebook would pay “a transmission rate per their usage on the system.” Tr. 2-4-19 at 172. She testified, however, that it appears that the revenue requirement of the Proposed BB2 Project is not currently being recovered from Facebook through the transmission charge in the SSC. Therefore, under PNM’s proposal, the only way that Facebook would pay for any part of the BB2 Project is if the SSC transmission charge is increased in PNM’s next general rate case. Tr. 2-4-19 at 173-74 (Alcantar).

Rate 36B requires Facebook to pay the cost of extending or upgrading its transmission or other facilities to the extent consistent with generally accepted regulatory principles of cost causation and states that the cost shall be included in the rates set in the SSC, with adequate provisions to secure Facebook’s payment obligation. Comm’n Exh. 2. PNM and Staff argue that Facebook’s responsibility for payment of transmission service is addressed in Section 5.2.11 of the SSC, which provides that, under Rate 36B, PNM will recover “Customer’s allocated share” of transmission costs through the Special Service Rate set forth in Exhibits D1 and D2 to the SSC. PNM’s Initial Posthearing Brief at 30; Staff’s Initial Posthearing Brief at 27. The Special Service

Rate includes a Transmission Demand Rate which is applied to a customer's monthly on-peak billable demand "and is designed to recover costs related to PNM's transmission capacity, as determined and allocated to customer in PNM general rate cases." Comm'n Exh. 5 at 198. The current Transmission Demand Rate set forth in Rate 36B is \$3.90 per billable on-peak kW. Comm'n Exh. 2. The Transmission Demand Rate addresses how the cost of *system* transmission upgrades are allocated to Facebook, as PNM recognizes. *Id.* at 30-31, 33; *see also* Comm'n Exh. 5 at 196 (Exh. D1). As demonstrated above, the BB2 Project is not a typical system project: 166 MW of the capacity of the Proposed Line is dedicated to a single retail customer: Facebook. The remaining capacity is dedicated to a transmission customer. Under these circumstances, the cost of the Proposed BB2 Project to Facebook is not to be recovered through the Transmission Demand Rate in the SSC, but through Section 3.3 of the SSC, which applies because the BB2 Project is required to meet Facebook's increased load and not the load of other PNM retail customers. Section 3.3 of the SSC is among "the rates set in the SSC," referred to in Rate No. 36B, because "direct reimbursement" falls within the definition of "rate" under the Public Utility Act. NMSA 1978, § 62-3-3(H) ("rate' means every rate, tariff, charge or other compensation for utility service rendered or to be rendered by a utility[.]").

Lastly, PNM and Staff cite to the Commission's granting of a variance from 17.1.210.12(B) and PNM Rule No. 4 in Case Nos. 16-00191-UT and 18-00269-UT. PNM says that the granting of these variances means that the method set forth in the SSC for determining Facebook's allocated share of PNM's transmission costs is not subject to modification. PNM indicates that these variances were granted because Facebook was concerned that 17.1.210.12(B) and PNM Rule No. 4 "might be used in the future to deprive it of the benefits of the bargain it struck to locate its Data Center in New Mexico." PNM's Initial Posthearing Brief at 31. Staff argues that the Commission is precluded from requiring Facebook to directly reimburse PNM for costs of the Proposed BB Project because it granted the variances to PNM. Staff's Initial Posthearing Brief at 28.

Requiring Facebook to directly reimburse PNM for costs of the Proposed BB2 Project is not inconsistent with the Commission’s granting of the variances: it is consistent with Section 3.3 of the SSC, which is too part of the bargain that Facebook struck to locate its Data Center in New Mexico.

The Commission should use its authority to enforce the SSR as an order of the Commission. Section 3.3 of the SSC requires Facebook, as part of the benefit it struck, to directly reimburse PNM for costs of the BB2 Project pursuant to generally accepted principles of cost causation. Cost causation means attributing costs to those customers or classes that cause them to be incurred and benefit from them. Case No. 12-00020-UT, Certification of Stipulation at 32 (7-11-12), adopted by Order on Reconsideration (8-14-12). Of the total 362 MW of capacity of the Proposed BB2 Project, 166 MW of capacity has been dedicated to serving the increased load of Facebook. Therefore, under generally accepted principles of cost causation, Facebook should be required to directly reimburse PNM for 45.9% of the costs of the Project ( $166 \text{ MW} \div 362 \text{ MW}$ ), or an estimated \$39,015,459 ( $\$85,001,000 \times 45.9\%$ ).<sup>13</sup> This is consistent with Facebook’s declared wish that the cost of electric service for its Data Center not be subsidized by any other customers. The ratemaking principles and treatment that should apply to the BB2 Project once it is placed in service are that PNM should not be allowed to recover any cost of the Proposed BB2 Project from retail ratepayers other than Facebook unless and until otherwise ordered by the Commission. Therefore, PNM’s requested ratemaking treatment should be denied.

Because Facebook is required to directly reimburse PNM for costs of the BB2 Project under the SSC, it is unnecessary to determine whether PNM’s request for ratemaking treatment violates its agreement in Case No. 10-00086-UT “not to request from the Commission rate recovery of any transmission costs that are not caused by, or do not directly benefit, New Mexico

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<sup>13</sup> This is an estimated amount. The actual amount likely would not include AFUDC and might have to be grossed-up for taxes among other possible adjustments.

retail customers.”<sup>14</sup> Case No. 10-00086-UT, Amended Stipulation to Conform to Commission Order, ¶ 36 (8-11-11).

Contrary to BKR’s assertion, *see* BKR’s Initial Posthearing Brief at 16, the Hearing Examiner’s recommended ratemaking principles and treatment are based on evidence in the record. They are based on the requirements of the original and current versions of the SSC, which were admitted into evidence as Commission Exhibits 1 and 5 and Rate No. 36, which was admitted into evidence as Commission Exhibit 2.

## **VIII. BKR’S ALLEGATION OF DENIAL OF DUE PROCESS, ARBITRARY AND CAPRICIOUS ACTIONS, ACTIONS NOT IN ACCORDANCE WITH LAW AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

At the February 4, 2019 hearing, when BKR’s attorney put Mr. King on the stand, BKR’s attorney sought to admit exhibits not attached to Mr. King’s prefiled testimony. He referred to the Wisconsin PSC Report, cited in, but not attached to, Mr. King’s prefiled testimony, and a study titled “Valuing Large-Scale Electric Transmission Line Right-of Way Corridors on New Mexico State Trust Land.” Tr. 2-4-19 at 170, 260. The Hearing Examiner denied admission, explaining that testimony at a hearing before the Commission is generally restricted to questioning about prefiled testimony and exhibits to prefiled testimony. When BKR’s attorney asked how he was to rebut testimony from PNM witnesses from the January 16, 2019 hearing, the Hearing Examiner said that he could do so through cross examination. *Id.* at 261. BKR’s attorney argued that this procedure violated his client’s due process rights, and BKR makes this argument again in its Initial Posthearing Brief. *Id.* at 261; BKR’s Initial Posthearing Brief at 16-19.

BKR’s due process rights were not violated because first, the Wisconsin PSC Report was cited repeatedly by Mr. King in his prefiled Direct Testimony, and the Hearing Examiner denied

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<sup>14</sup> The Amended Stipulation says, “‘Directly benefit’ includes transmitting power for retail customer use, transmitting power for off-system sales, and enhancing system reliability.” *Id.*

PNM's Motion to Strike Mr. King's references to the Report. Tr. 1-16-19 at 8. Second, the study on valuing transmission line right-of-way corridors on New Mexico State Trust Land is not relevant. Admissible evidence is restricted to relevant evidence. 1.2.2.35(A)(1), (L)(4) NMAC. The Hearing Examiner, "with or without objection may exclude inadmissible, incompetent, cumulative, or irrelevant evidence or order the presentation of such evidence discontinued." 1.2.2.35(L)(2) NMAC. Bill King testified that BKR is not asking the Commission to decide the amount that PNM should pay to BKR for a right-of-way. Tr. 2-4-19 at 278. And, as explained in *supra* Section III, the Commission lacks jurisdiction to determine what constitutes just compensation. *United Water New Mexico, Inc. v. New Mexico Pub. Regulation Comm'n*, 1996-NMSC-007, ¶ 28, 121 N.M. 272. Admission of the study would have injected an issue into the case that is beyond the Commission's jurisdiction and therefore irrelevant.

BKR argues that, "in glaring contrast," following the first day of the hearing on January 16, 2019, the Hearing Examiner allowed PNM witness Jeff Mechenbier to be recalled to provide additional oral testimony when the hearing continued on February 4, 2019. BKR's Initial Posthearing Brief at 18-19. What BKR ignores is that on January 29, 2019, PNM filed a Motion to Recall Jeff Mechenbier to Provide Supplemental Oral Testimony, which BKR did not oppose. PNM's Motion to Recall Jeff Mechenbier to Provide Supplemental Oral Testimony at 4.

BKR points out that at the end of the first day of the hearing on January 16, 2019, BKR's attorney asked whether he could continue to serve discovery on PNM during the period until the hearing was scheduled to continue on February 4, 2019, and the Hearing Examiner responded that there was no rule prohibiting it. BKR argues that the results of that discovery could not have been attached to Bill King's prefilled Direct Testimony. BKR's Initial Posthearing Brief at 18. What BKR ignores is that the Hearing Examiner allowed BKR's attorney to ask Mr. Mechenbier questions about PNM's response to that discovery request, over PNM's objection, even though it was outside the scope of Mr. Mechenbier's supplemental oral testimony. The

Hearing Examiner allowed the questioning because she said it might be relevant. Tr. 2-4-19 at 238-39.

## **IX. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Hearing Examiner recommends that the Commission **FIND AND CONCLUDE** as follows:

1. All findings of fact and conclusions of law contained in all Sections of this Recommended Decision are adopted as findings of fact and conclusions of law of the Commission.
2. PNM is a public utility as defined by NMSA 1978, § 62-3-3(G) and its New Mexico retail service is subject to the jurisdiction of the Commission.
3. Reasonable, proper and adequate notice of PNM's Application has been provided.
4. The Proposed BB2 Project is required by the public convenience and necessity and will not result in unnecessary duplication or economic waste. Issuance of a certificate of public convenience and necessity for the Proposed BB2 Project is in the public interest and should be approved.
5. The location of the proposed transmission line will not unduly impair important environmental values.
6. The maximum right-of-way width necessary to construct and maintain the BB2 Line is 200 feet.
7. Facebook should be required to directly reimburse PNM for costs of the BB2 Project pursuant to generally accepted principles of cost causation.
8. The ratemaking principles and treatment that should apply to the BB2 Project once it is placed in service are that PNM should not be allowed to recover any cost of the Proposed BB2 Project from retail ratepayers other than Facebook unless and until otherwise ordered by the Commission.

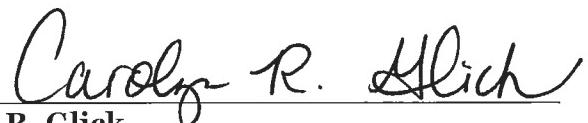
## **X. DECRETAL PARAGRAPHS**

The Hearing Examiner recommends that the Commission order as follows:

- A. The findings, conclusions and rulings contained in this Recommended Decision are adopted and approved as findings, conclusions and rulings of the Commission.
- B. PNM is granted a certificate of public convenience and necessity to construct, operate and maintain the Proposed BB2 Project, subject to the following conditions:
  - 1. PNM shall file copies of all construction permits received for the BB2 Project within two weeks of receipt.
  - 2. PNM shall file a summary of the actual cost of the BB2 Project for comparison to PNM's Exhibit JRM-9 on Page 11 of Appendix A within 60 days after all final costs have been incurred and cleared the accounting system.
  - 3. PNM shall file a notice of the date that the BB2 Project is placed into service.
- C. The location of the Proposed BB2 Project is approved under NMSA 1978, Section 62-9-3.
- D. PNM's requested ratemaking treatment is denied.
- E. Facebook shall directly reimburse PNM for costs of the BB2 Project pursuant to generally accepted principles of cost causation.
- F. The ratemaking principles and treatment applicable to the BB2 Project once it is placed into service are that PNM shall not recover any cost of the Proposed BB2 Project from retail ratepayers other than Facebook unless and until otherwise ordered by the Commission.
- G. This Order is effective immediately.

**ISSUED** at Santa Fe, New Mexico on March 11, 2019.

**NEW MEXICO PUBLIC REGULATION COMMISSION**

  
Carolyn R. Glick  
Carolyn R. Glick  
Hearing Examiner

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF PUBLIC SERVICE )  
COMPANY OF NEW MEXICO'S )  
APPLICATION FOR APPROVAL OF A ) Case 18-00243-UT  
345 KV TRANSMISSION LINE AND )  
ASSOCIATED FACILITIES PURSUANT )  
TO THE PUBLIC UTILITY ACT )  
)

**CERTIFICATE OF SERVICE**

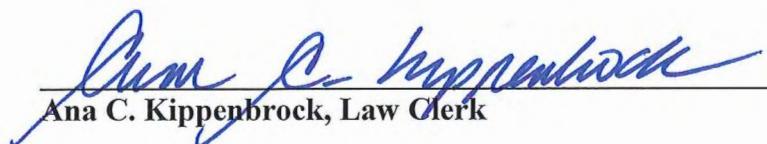
I CERTIFY that on this day I sent to the parties listed below, via email only, a true and correct copy of the **Recommended Decision** issued on March 11, 2019.

Rick Alvidrez	<a href="mailto:ravidrez@mstlaw.com">ravidrez@mstlaw.com</a> ;
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Carolyn Glick, Hearing Examiner [Carolyn.Glick@state.nm.us](mailto:Carolyn.Glick@state.nm.us);

**DATED** this 11th day of March, 2019.

NEW MEXICO PUBLIC REGULATION COMMISSION

  
Ana C. Kippenbrock, Law Clerk